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ALLAHABAD

1972

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reasons or causes for the failure. Simply because the consignor has entered into a bond under r 153 the consignor is not relieved from the requirement of making a triplicate application and his failure to present the certified triplicate makes him liable to pay the duty under rr. 156-A and B.

Collector, Central Excise v Munshi Lal Budh Sen
Civil Service—*Selection for promotion—Adverse entry in the character roll against which appeal was pending—Consideration of, at the time of selection—Adverse entry subsequently ordered to be expunged—Propriety of selection—Principle of natural justice—Violation of—Forest Service Rules, 1952, Appendix B.*

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Held, in making the selection of Assistant Conservators of Forest from amongst the Forest Rangers in the year 1964, without keeping one post vacant for the petitioner in case after his appeal had been allowed and he was considered fit for permanent appointment to the post of Assistant Conservator of Forest, there can be no doubt that the Chief Conservator of Forest and the State Government did not act fairly and the petitioner has suffered for no fault of his. In the circumstances of the case there can be no doubt that the rules of natural justice were violated.

State of U. P. v. Badlani Lakshman Govind
 — *Suspension, pending departmental enquiry—Power of—Delegation and confirmation of power on subordinate authority—Distinction between*

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Where the power of suspension pending departmental enquiry has been delegated to an authority, such power can be exercised both by the delegating authority and the delegated authority subject to this restriction that once the power has been exercised by the delegated authority it can no longer be exercised by the delegating authority. The delegated authority acts as agent and consequently once he has done an act it is binding on the principal also.

But if the rules are not by way of delegation of power but confer certain powers on a subordinate authority the power can be exercised by that authority.

Mritunjai Singh v State of U. P.

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Code of Civil Procedure, 1908, s. 47, O. XXI, r. 2—Decree for ejectment—Before eviction judgment-debtor becoming partner of decree-holder's firm—Execution of decree—Objection under s. 47 that the decree has become inexecutable—Maintainable.

A transaction entered into between a decree-holder and a judgment-debtor which makes a decree ineffective can be set up as a bar to an execution even if it has not been got certified under r 2, O. 21, C. P. C.

Held, that the judgment-debtor was entitled to set up a plea under s. 47, C. P. C. that the new tenancy created in his favour by decree-holder rendered the decree inexecutable.

- Chitra Talkies (Buildings) v Durga Das Mehta*
 —, 1908, ss. 151 and 152—*Accidental mistakes in plaint or decree—Correction necessary in the ends of justice—Court's power to amend such mistakes.*

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Accidental mistakes which had crept in the plaint or decree can be corrected by the Court, apart from the powers exercisable under s. 152, if such correction is necessary in the ends of justice. Extensive powers may be exercised also under ss. 151 and 152, C. P. C.

Ganesh v. Sri Ram Lala Ji Maharaj, Binayman Mandir (F. B.)

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- , 1908, O. IX, r. 6, 13, and O. III, r. 4(2)—*Ex-parte decree—Defendant's counsel present but reports no instructions—Decree passed under O. IX, r. 6, if an ex parte decree—Setting aside of.*

Held, it is true that even if the defendant is not personally present but is present through a pleader duly instructed and able to answer all material questions relating to the suit as contemplated by O. V, r. 1 (2) (*b*), the appearance of the lawyer may amount to the appearance of the defendant for the purposes of O. IX, r. 6. But in this case the defendant was not represented by a pleader duly instructed on the date, because his counsel who was engaged by him under O. III, r. 4, C. P. C. had clearly stated that he had no instructions from the defendant. Under these circumstances the decree that was passed by the trial court on 29th September, 1906, was an *ex parte* decree which could be set aside on the application of the defendant made under O. IX, r. 13, C. P. C. if sufficient cause was shown to the satisfaction of the court for his non-appearance on that date.

Sunder Lal v Ram Swaroop

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- , O. XXI, r. 63—*Decree passed in suit under O. 21, r. 63—Objection of the judgment-debtor disallowed by the executing court and sale held—Decree in the suit does not result in automatic cancellation of the sale in favour of the auction purchaser.*

A sale held in execution of a decree cannot be set aside unless the executing court allows any objection grounded on the provisions of O. 21, rr. 89 or 90 or 91 and the sale in execution proceedings is not destroyed by the decree in a suit under O. 21, r. 63. Leaving aside the cases where the sale is held without giving notice to the judgment-debtor or where the court is misled in fixing the price or when there was no decree in existence at the time when the sale was held, an execution sale can only be set aside when an application under rr. 89 or 90 or 91 of O. 21 has been successfully made. This principle will apply even to a case where the property sold in auction does not belong to the judgment-debtor. There is no inherent power vested in the court to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold. There being a specific provision for it in the Code under r. 91

a sale could be set aside on such a ground only at the instance of the auction purchaser.

———, *O. XXI, rr. 58(2) and 92 as amended by Allahabad High Court—Whether result in changing the law.*

These amendments make explicit what was hitherto implicit. By the addition in sub-r (2) of r 58 there has been a further elaboration of the power of the executing court. Where a claim or objection is disallowed and the aggrieved party files a suit under r. 63 which is ultimately dismissed, there will be no difficulty in confirming a sale held during the pendency of the investigation of the claim or objection under r. 58. Where the suit of the aggrieved party under r 63 is decreed then the conclusiveness attached to the decision under s. 58 will be destroyed and if the auction purchaser was bound by the decree in the suit he cannot resist the successful claimant to take possession of the property sold.

Ramesh Kumar v. Budh Ram Sharma . . . 354

———, 1908, *O. 39, r. 9—Attachment before judgment—Dismissal of suit in default—Attachment automatically lapses—No revival of attachment on restoration of suit.*

[*per majority*; GULATI, J. (contra)] On the dismissal of suit in default, the attachment before judgment automatically lapses and a fresh attachment is necessary on the restoration of the suit as the previous attachment does not revive.

Abdul Hamid v. Karim Bux (F. B.) . . . 511

Criminal Procedure Code, 1898, s 190(1)(a)—Presentation of complaint by post—Effect

It may be noticed that the words used in sub cl. (a) of s. 190 are "upon receiving complainant". The word "receiving" should include receiving by post. It will thus appear that there is nothing even in s. 190 which may lead to the conclusion that a complaint must necessarily be presented to the Magistrate by the complainant himself or through his counsel.

State v. S D Gupta . . . 521

———, 1898, *s. 526 (1) (i) and (ii)—Transfer of case, inquiry or trial—Jurisdiction of transferee's court to deal and enquire with cases which may later on be instituted against persons not covered by the original case.*

S. 526(1), Cr. P. C empowers the High Court to pass any of the four orders detailed therein, or to pass and order under one or more clauses of this section. Consequently, if the High Court had, by an order express or implied, ordered the transfer of an inquiry into or trial of an offence the transferee court would have had the jurisdiction to take up commitment proceedings in respect of other accused.

In the instant case, however, the two cross-cases had been transferred. None of them was against the present applicants. Consequently, the order of transfer as it at present stands did not empower the Additional District Magistrate (Judicial), Lucknow, to institute proceedings against the present appli-

cants in respect of the offence committed within the district of Bara Banka.

Ram Sukh Kumar *v* State
Constitution of India, Art 14—Reasonable classification—Test for. 534

Art. 14 of the Constitution forbids class legislation. It does not forbid 'reasonable' classification. To pass the test of permissible classification, two conditions must be fulfilled, namely; (1) that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from those left out of the group, and (2) that differentia must have a rational relation to the objects sought to be achieved.

Shyam Sunder *v*. Siya Ram . 368
 ———, 14—*Discrimination—Protection against—Extends to executive action also.*

The protection against discrimination afforded by Art. 14 extends not merely to legislative action but also to executive action in exercise of express statutory powers.

State of U P *v* Badlani Lakshman Govind 399
 ———, Art. 22(4)—*U P. Control of Goondas Act, 1970 does not offend Art. 22(4)*

The Act is not a law providing for preventive detention and cannot be challenged on the ground of being offensive to Art. 22(4).

Haashu Nautain *alias* Haashu *v*. District Magistrate 412
 ———, Art. 133 (1) (a) and (b)—*Probate of will covering properties more than Rs.20,000—Property bequeathed is not subject-matter of dispute—Judgment against which appeal sought to be filed One of variance—Art 133(1)(b) applies.*

In proceedings for grant of a probate the property bequeathed is not the subject-matter in dispute and Art. 133(1) (a) will not be attracted, but cl. (b) will apply. Once probate is granted, the legatee becomes entitled to the properties bequeathed to her and will continue to be so entitled to the same unless any contrary decision is given by a competent court of law on a suit for declaration of title. Where the order granting probate involves claim respecting property of a value of more than Rs 20,000 and the judgment against which an appeal is sought to be filed in the Supreme Court is of variance, Art. 133(1)(b) is clearly attracted.

Seth Beni Chand *v* Smt. Kamla Kunwar . . 692
 ———, Art. 226—*Habeas corpus—Maintainability of.*

An application of *habeas corpus* is competent even when a person is released on bail.

Ram Lal Poddai *v*. Tahsildar, Nanpara ... 34
 ———, Art. 309—*Powers conferred on authority through rules framed by the Governor under—Exercise of.*

Under Art. 309 of the Constitution the Governor has the power to make rules and once rules have been framed conferring power on particular authority to pass an order, that authority

alone can take action and not the authority which could have framed the rules or which could have otherwise passed an order in that matter

Mritunjai Singh v. State of U. P.

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—, Arts 310 and 311(2)—*An extra departmental agent working as Branch Post Master—Civil Service—Necessity of second show-cause notice—Entitled to protection under Art. 311(2).*

An extra Departmental Branch Post Master is a public servant entrusted with the duty to do official acts in relation to the affairs of the Union, and is the holder of civil post within the meaning of Arts. 310 and 311(2), of the Constitution. He is entitled to the protection of Art. 311(2), and is entitled to the reasonable opportunity of making representation on the penalty proposed to be awarded. Order of dismissal held void.

Jogendra Bahadur v. Senior Superintendent, Post Office, Allahabad

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Court Fees Act, 1970 s. 7 (iv-A)—*Instrument by a benamidar in favour of the real owner—Not a release deed—Nor a instrument securing property.*

When a benamidar executes a document declaring that he is a benamidar for a person, he merely acknowledges or admits openly and publicly a fact, viz. that that person alone acquired title, ownership and interest in the property in question. He does not release or relinquish any title, interest or claim. Legally he had none. Such a document will not come within the mischief of s. 7(iv-A) of the Act or the expression "instrument securing property."

Brij Bhushan Mittal v. Mannoo Lal Mittal

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—, 1870, Sch. II, Art 17(vi)—*Court-fee—Payment of—In appeal against refusal to pass an instalment decree.*

Where the appellant admitted the amount decreed but filed an appeal against the trial court's refusal to grant instalments.

Held: in this case it is difficult to put a money value to the subject-matter of the appeal and as such the case is covered by Art 17(vi) of the Second Schedule of the Court Fees Act. No *ad valorem* court-fee on the entire amount decreed is payable in such a case.

Sheo Narain v. Radhey Shyam

507

Employees' Provident Funds Act, 1952, ss. 14(3) and 19—*Central Government may specify the authority itself or delegate its power to State Government—Labour Commissioner, U. P. can issue sanction for launching prosecution.*

Employees' Provident Funds Act, 1952, ss. 14(3) and 19—Central s. 19 of the Act it may delegate its power to a State Government. Under the delegated power the State Government is vested with the power to specify an authority competent to grant the sanction.

Held: that the Labour Commissioner, U. P. was the duly specified authority for issuing sanction under sub-s. (3) of s. 14 of the said Act for launching the prosecution for contravening the provisions of the Employees' Provident Funds Act

State of U. P. v. Ram Gopal Gupta (F. B) . . .

788

Employees' State Insurance Act, 1948, s. 2(12)—*Employees working outside the factory premises—Entitled to the benefits of the Act.*

If the requisite number of workers are engaged in work which is an integral part of the manufacturing process, though their work may be carried on at different places, they will not only be employees as defined in s. 2(g) of the Employees' Provident Fund but they should also be held to be working in the same factory.

S. P. Verma v. Regional Director . . .

300

Essential Commodities Act, 1955, s. 3(1)—*Power under—Storage of essential commodity if covered by the language under s. 3, sub-s. (1) and (2)—Relative position of—Sub-s (2) cannot be read as restrictive of the generality of power conferred by sub-s. (1)*

The power under sub-s. (1) of s. 3 is couched in very wide language. The exercise of the power may be either regulatory or prohibitory, or may partake of both these characters. Storage is clearly implied in the wide language used in sub-s. (1) and the Central Government has the power to regulate or prohibit storage of an essential commodity. The argument that storage is not within the ambit of sub-s. (1) because it occurs in cl. (d), sub-s. (2) is not well founded. Sub-s. (1) is the reservoir or fountain of the totality of powers envisaged thereunder whereas the specified powers under the various clauses of sub-s. (2) are mere streams or tributaries that flow out of that reservoir or fountain. The use of the words "without prejudice to the generality of the powers conferred by sub-s. (1), an order made thereunder may provide" for the specific powers under cls. (a) to (j) of sub-s. (2) itself indicates that the powers specified in those clauses are illustrative of the general power embodied in sub-s. (1). Sub-s. (1) is exhaustive of the powers, sub-s. (2) merely gives an illustrative list of some of those powers and cannot to read as restrictive of the generality of the powers conferred by sub-s. (1).

— 1955, s. 3 (1) and (2) Words "Regulating and prohibiting"—*Meaning of Distinction between Cl. (d) deals with the power to regulate and not to prohibit Delegation of power under cl. (d) Delegate has no authority to prohibit.*

"Regulating and prohibiting" are two distinct and separate attributes of power under s. 3. The power to regulate portrays the idea of control, governance and direction, while the power to prohibit conveys the sense of the imposition of a ban, or the placing of a restraint or restriction. Cls. (a), (d) and (g) of sub-s. (2) speak of the power to regulate, cl. (e) confers the power to prohibit and the remaining cls. (b), (c), (f), (h), (i), (ia) and (j) though they do not mention that they are illustrative

of the power to regulate, impliedly partake the character of that power. Cl. (d) has relation to the power to regulate and has no connection whatsoever with the power to prohibit. On the footing of the delegation made under cl. (d) the State Government has derived the power as a delegate to regulate "storage" but has no authority to prohibit "storage"

State of U. P. *v.* Suraj Bhan Pandey . . .
Evacuee Interest (Separation) Act, 1951, s. 10 and Administration of Evacuee Property Act, 1950, s. 10—Evacuees' share determined but not transferred—Property continues to vest in the Assistant Custodian.

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Evacuee property would go outside the management and control of the Assistant Custodian only after the evacuee's interest had been separated and transferred. Merely passing an order that such share may be transferred would not divest the management of the property from the Custodian.

Syed Anwar Ahmad *v.* Assistant Custodian General, Evacuee Property . . .

641

Factories Act, 1948, s. 106—Requirements of—Complaint to be made within three months—Cognizance can be taken any time thereafter.

What s. 106 requires is that the complaint should be made within three months. Once the complaint is made within that period cognizance thereof can be taken any time thereafter.

—, s. 8(2) and (4)—District Magistrate has dual character.

Even though the District Magistrate is a Factory Inspector, he is also a Magistrate exercising jurisdiction throughout the district and in that capacity he constitutes a Court. Under the circumstances the fact whether the complaint was sent by the Factory Inspector to the District Magistrate treating him to be a superior officer in the hierarchy of his department, or it was sent to him as a Court, should rest on the language of the complaint and the letter accompanying it.

State *v.* S. D. Gupta . . .

521

Forward Contract (Regulation) Act, 1952, s. 11-A—Registered Association—Forward Markets Commission can prevent such Association from carrying on its business—Commission's prior approval necessary

Under s. 14-A of the Forward Contracts (Regulation) Act, 1952, the Forward Markets Commission is empowered to prevent a registered association from carrying on its business in any commodity without its prior approval.

Union of India *v.* Bullion and Agricultural Produce Exchange Ltd. . . .

562

Hindu Marriage Act, 1955, s. 19—Husband residing at Dehra Dun—Wife going there to settle dispute with husband—Dehra Dun Court had no jurisdiction to try the petition for dissolution of marriage.

...

before the words "reside" and "last resided together" we find the words "husband and wife" which means that in order to

confer the jurisdiction on a court, a petitioner must prove that the parties reside or last resided together as husband and wife. If the wife went to the husband's place only to get rid of the husband or to quarrel with him, it would not be proper to say that the parties last resided as husband and wife at that place.

That a casual visit or a temporary visit with an intention other than to reside would not confer jurisdiction under s. 19 of the Hindu Marriage Act to entertain the petition.

Smt. Supriya *v.* Vasudeo Dang 78

Income Tax Act, 1961, s. 221—*Whether Income tax Officer has power to impose penalty under s. 221 of the Act.*

When s. 221 is read along with s. 256(1) and (o), there is left no room for doubt that the power under s. 221 is exercisable by the Income-tax Officer.

D. C. Puhani *v.* Income tax Commissioner (F. B.) ... 453

Indian Contract Act, 1872, s. 55—*Agreement to reconvey immovable property—Definite period fixed in the agreement—Time is essence of contract—Plaintiff to strictly comply with the conditions of contract.*

In the case of an agreement to reconvey, the original vendee acquires under the original sale deed from the original vendor a precarious title in the sense that by agreement to reconvey the same he undertakes a risk and uncertainty of acquiring an absolute and indefeisable title. As such, if in the agreement of reconveyance a definite time is fixed, that time would be of the essence of the contract and a court of equity except in cases of unavoidable accident, fraud, misrepresentation, etc. will not give any equitable relief to the plaintiff if it is established that he failed to strictly abide by the specific conditions subject to which the agreement of reconveyance was executed.

Dewan Man Mohan Lal *v.* Patey Lal alias Dulh Sain 426

Indian Evidence Act, 1872, s. 116—*Plots let out by Custodian—Lessee cannot challenge Custodian's title till he surrenders the plots.*

Where the appellant had admittedly taken the plots in dispute from the Custodian on lease, he was estopped from challenging the Custodian's title till he had surrendered possession over the said plots to the Custodian and it is not open to him to contend that only the evacuee's share having vested in the Custodian, he was not the appellant's landlord in regard to the entire plot in dispute.

Syed Anwer Ahmad *v.* Assistant Custodian General, Evacuee Property ... 641

Indian Income-tax Act, 1922, ss. 24 (1) and (3) and 28 (1) (c)—*Penalty imposed under s. 28(1)(c) on Hindu undivided family on 22nd August, 1963—Taxpayer's appeal in partition allowed by Tribunal holding disruption of Hindu undivided family from 6th May, 1958—No order of penalty can be passed under s. 28(1)(c).*

Before an order of penalty can be sustained, the assessable entry on which the penalty is being imposed must be in existence on the date of the order.

An order of penalty passed against an Hindu undivided family on 22nd August, 1963, by the Income-tax Officer cannot be sustained when the Tribunal had allowed its appeal by an order dated 12th December, 1963, recognising its partition as from 6th May, 1958 as claimed by it

The fiction created by s. 25-A(3) does not come into play in a case where an order under s. 25-A has been passed. To put a different interpretation on s. 25-A(3) would work unnecessary hardship and injustice on assesseees.

Commissioner of Income-tax v. Nathi Mal Gaya Lal (F. B.)

458

Indian Limitation Act, 1908, Art. 113—*Period of three years to be computed from the date fixed under the agreement.*

The period of three years under Art. 113 is to be computed from the date fixed for the performance of a contract or if no such date was fixed, when the plaintiff had notice that such performance was refused

Dewan Man Mohal Lal v. Piarey Lal alias Budh Sam
Indian Railways Act, 1890, ss. 82-A and 82-J and Railway Accident Compensation Rules, r. 6—*Power of Claims Commissioner to award compensation for personal injury*

426

Where the Claims Commissioner found that the claimants had suffered pain and suffering because of the injuries received on account of railway accident he had powers conferred upon him by the Statute and the Rules to award compensation.

Railway Accident—Loss of cash—Compensation payable.

If it can be established that the loss of currency notes was due to railway accident; clearly compensation is payable.

Union of India v. B. K. Ojha

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Indian Railways Establishment Manual, paras 216 (J) and 217 (a) and (b)—*Railway Selection Board—Candidate selected by such panel and approved by competent authority—Subsequent cancellation—Invalid.*

Under para 216, no provisional list can be prepared. Once a selection is duly made by the Selection Board and the panel is approved by the competent authority, rights to the persons selected and put on panel accrue under cls. (a) and (b) of para 217.

Para 216(J) does not confer an absolute and uncontrolled power on the higher authority to cancel the selection and the panel of selected candidates.

It cannot be said that para 217 was framed for purpose of embellishment and not for the purpose of affording some rights on candidates who are declared to be successful at the selection examination and whose names are included in the panel as such.

Notification cancelling the panel of selected candidate held invalid

—, para 216(I)—‘Other defects’—Higher authority when cannot cancel or amend a panel.

The expression “other defects” even if given wide connotation would not confer on the higher authority power to cancel or amend a panel merely because he was personally of the view that the papers set by the Selection Board or the standard of giving marks to the examinees on examination of the answer books or at *viva voce* tests were very lenient.

Shyam Behari Lal v General Manager

—, paras 2832 and 2838—Departmental canteen—Servants of—Railway servants.

The personnel of the staff employed by the canteen which is a departmental statutory canteen are to be treated as Railway servants. It is further clear from the second not appended to para 2834 of the Manual which clarifies that in cases where the canteens are being run on a co-operative basis and there subsists a relationship of master and servant between the Co-operative Society or the managing committee and the canteen employees, the canteen staff are not to be treated as Railway servants.

Held, a canteen being run under statutory obligation, other than on co-operative basis, the staff employed therein would be treated as Railway servants.

Union of India v. Ramjee Pandey

Indian Registration Act, 1908, ss. 17(1)(b) and 49 - Unregistered document—Admissibility of—Suit for partition—Decree in terms of compromise passed in—Compromise defining shares of parties also in respect of some other property not subject-matter of the suit—Registration Necessity of. Held, compromise could be relied on as an admission of antecedent title.

Where the compromise was entered into in a partition suit by which the parties took separate shares in the disputed Khata. The compromise also embodied a recital defining the shares of the parties in respect of property not subject-matter of the partition suit. In a subsequent litigation between the parties regarding the shares of parties in the property contained in the recital, question arose as to whether the compromise was inadmissible in evidence as proof of title in view of s. 17(1)(b) read with s. 49 of the Indian Registration Act.

Held, the parties recognized the existing title of each other and defined their shares by the compromise. A recognition of title or definition of a share on the basis of that recognition cannot be treated as creating, declaring, assigning, limiting or extinguishing any right, title or interest in immovable property, such a recognition may be oral or by a document, and if in document, it would not require registration. Even an unregistered document can be relied upon in proof of admission of title. The compromise can be relied upon as an admission of antecedent title.

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- Shyam Sunder *v.* Siya Ram 368
- Indian Stamp Act**, 1899, s. 2(15) and Sch. I-B, Art. 45—*Document reciting the factum of earlier partition—Subsequent document executed to serve as evidence of earlier partition—Chargeable to duty not as an instrument of partition*
- Where a document executed on 4th September, 1969 recited that the parties who belonged to the same family had partitioned the properties and entered into separate possession of their shares on 27th March, 1969 and subsequently a map had also been prepared while certain portions of it had been left joint and the document was being executed to serve as evidence of the earlier partition, *held*; that it was an instrument of partition and the stamp duty of Rs.2.25 was sufficient on it
- Siya Ram *v.* State of U. P. (S. B.) 296
- , 1899, s. 2(5)(a), Sch. I-B, Art. 15—*Agreement or a Bond—*
- , 1899, s. 2(5)(a), Sch. I-B, Art. 15—*Agreement or a Bond pay back the advance money—Document unattested—Not a bond, but an agreement.*
- Where the document read as a whole represents a transaction of an agreement to sell a commodity and an advance payment of its price; one of the terms of the transaction being that in default of supplying the agreed quantity the executant will pay damages at a certain rate and there was no express promise to pay back the advance price in case of default and the document was not attested; *held*; that such a document would be chargeable to stamp duty as an agreement and not as a bond.
- Mahabir Prasad *v.* Peer Bux (F. B.) 127
- , 1899, ss. 31 and 32—*Collector certified a particular document as an agreement—Covered under Art. 5(c)—Collector can take a different view on the similar documents for which no certificate was issued earlier—Principle of res judicata not applicable.*
- A certificate issued by the Collector in each case is in respect only of the particular instrument certified and is not meant to be operative in respect of instruments of a similar nature not brought before him for certification. The opinion of the Collector in an earlier case thus cannot debar him from giving a different opinion subsequently on the principle of *stare decisis*. It can also not debar him from arriving at a different conclusion to which he has arrived in the present case on the principle of *res judicata* as there was neither a judicial determination of the matter by the Collector nor the present applicant was a party to the earlier instrument.
- , Art. 35, Sch. I-B and Art. 5(c)—*Agreement to grant a lease in future—Premium and rent paid to get lease—Document is an agreement to let and duty is payable under Art. 35, Sch. I-B and not under Art. 5(c), Sch. I-B.*
- Where if the Improvement Trust had undertaken to grant in future a lease in favour of the first party or his nominee by executing necessary lease deeds and the first party had for the

purpose of obtaining that lease paid certain amount by way of premium and rent to the Improvement Trust in respect of the plots mentioned in Sch. B of the document held; that the document will be an agreement to let

Even though an agreement to lease may not possess all the characteristic of lease and may not effect demise of property it would be chargeable to stamp duty of the same amount as lease under Art. 35 read with the entry about an agreement to lease mentioned in Art. 5 of the Schedule

Darbari Singh Saini v Board of Revenue (S. B.).

Intermediate Education Act, 1921—*Examination Committee is not required to give personal hearing to candidates—Spot Enquiry Committee obtaining explanation is an ample opportunity—Copy of report need not be given to candidate.*

Neither the Intermediate Education Act nor the Rules and Regulation framed thereunder require the Examination Committee to give personal hearing to the candidate. There is no statutory requirement of personal hearing. Personal hearing is not one of the necessary requirements of principle of natural justice.

—, 1921, *Board's Calendar, Chap. VI, para 2(1)—Punishment under—No opportunity given to show cause against proposed punishment. No violation of rules of natural justice.*

Rules of natural justice do not require, as do the provisions of Art. 311 of the Constitution, the giving of an opportunity to show-cause against the proposed punishment; they merely require the affording of an opportunity to explain or meet the charges or allegations levelled against the person concerned

Triambak Pati Tripathi v. Board of High School and Intermediate Education (F. B.)

142

Interpretation of Statute *Proviso dependent on the main enactment - Cannot be read as a substantive provision.*

The normal rule of construction with regard to a proviso is that it must *prima facie* be limited in its operation. It cannot be treated as if it were an independent enacting clause instead of being dependent on the main enactment. It is foreign to the proper function of a proviso to read it as a substantive provision save in every exceptional cases.

Abida Khatun v. General Manager, Diesel Locomotive, Varanasi (F. B.)

175

—, *Superfluity may be imputed to the Parliament only in the last resort.*

Obviously, s. 221 does not empower specifically any authority to impose penalty on an assessee who has defaulted in payment of tax due to him. But it cannot be assumed that s. 221 is *otiose*. Superfluity may be imputed to the Parliament only in the last resort if no other provision in the Act is found to repair

the omission in s. 221. A section in a statute should be construed in all its inter-connections.

D. C. Puliani v. Income tax Commissioner (F. B.)

453

Land Acquisition (Amendment and Validation) Act, 1967, s.

4(2)—*Prescribes a time-limit in respect of making a declaration under s. 6(1) of the Land Acquisition Act and not to publication of declaration under s. 6(2) of the Act.*

S. 4(2) places a limitation of two years from the date of the commencement of the Ordinance or the making of the declaration under s. 6(1) of the Land Acquisition Act and not on the publication of that declaration under s. 6(2) of the Act. A declaration under s. 6 is made under sub-s. (1) and not under sub-s. (2); hence s. 4(2) of the Land Acquisition (Amendment and Validation) Act prescribes a time-limit in respect of making of a declaration under s. 6(1).

The limitation prescribed by s. 4(2) of the Land Acquisition (Amendment and Validation) Act is not applicable to publication under s. 32(1) which is equivalent to a publication under s. 6(2) of the Land Acquisition Act.

S. 17(1) of the Land Acquisition Act, 1894—*Modified in its application to proceedings under U. P. Ayas Evam Vilash Parishad Adhiniyam, 1965—Applicable to all lands and is not confined to waste or arable lands.*

S. 17 of the Land Acquisition Act in its application to proceedings under the U. P. Ayas Evam Vilash Parishad Adhiniyam, 1965, s. 17(1) as amended is applicable to all lands and is not confined to waste or arable land.

Under the housing accommodation scheme, provision has been made for the building of houses by the Board and by others while under the land development scheme sites have to be developed for construction of houses. Both these schemes under the U. P. Ayas Evam Vilash Parishad Adhiniyam are for meeting the need of housing accommodation by the residents of particular area. Both the schemes under the Adhiniyam were included under the Town Improvement Act in one scheme under the "housing accommodation scheme."

Khadim Husain v. State of U. P.

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Land Improvement Loans Act, 1883, s. 7 and U. P. Taqavi Rules and U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 279—Taqavi loan—Recovery of—Process for.

There is a distinction between arrears of land revenue and sum recoverable as arrears of land revenue but once a statute says that a particular loan can be recovered as if it was an arrear of land revenue s. 279 of U. P. Zamindari Abolition and Land Reforms Act will have full application.

Held; the transaction in question was a Taqavi loan and the respondent had the right to issue a citation or to attach the movables or to arrest the petitioner or to do all those things simultaneously or one after the other.

Ram Lal Poddar v. Tahsildar Nanpara

...

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Malikana Allowance—*Whether by way of compensation of the proprietary right and determines under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act*

Per G. C. MITTHUR, J. (On difference of opinion between S. CHANDRA, J. and TRIVEDI, J.). The Malikana Allowance was not by way of compensation for acquisition of his proprietary right and did not determine under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act.

The Malikana was paid by the inferior proprietor to the superior proprietor in respect of his proprietary rights and the allowance was not compensatory one for the acquisition of the rights of the Raja.

Raja Bahadur Bhagwati Prasad Singh v. State of U. P. Motor Vehicles Act, 1939, ss. 96, 110-B, 110-D and 110-F—Accident by an insured car—Deceased's representative can claim compensation even against the insured person.

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S. 96 primarily deals with the insurer. Its purpose is not to define or limit the liability of the insured person.

S. 110-F bars the jurisdiction of civil courts, and all claims for compensation will come within the jurisdiction of Claims Tribunal. The phrase "any question relating to any claim for compensation" is so wide that it will obviously include the question of fact or law which Claims Tribunal can adjudicate against the insurer.

Vishwa Mitra Chaddha v. Smt. Amit Kaur ..

42

Municipal areas under the Town Improvement Act—*Housing accommodation scheme under the Town Areas Act can be framed—The phrase "any area to which the Act is extended"—Meaning of.*

The expression "any area to which this Act is extended" embraces the Municipal area as well as the adjoining area to which the test of the Act is extended or applied. S. 2 of the U. P. Town Improvement (Adaptation) Act did not in any way alter or amend the provisions of sub-s. (3) of s. 1 of the Town Improvement Act. Both the provisions contemplate the bringing into operation of the Town Improvement Act in the Municipal area as well as the adjoining area at the same time. S. 2 of the Adaptation Act only authorises the State Government to bring the Act into operation with the adaptation mentioned in the Schedule. Hence a housing accommodation scheme could validly be framed for Municipal area also.

Khadim Husain v. State of U. P. ...

727

Oudh Estates Act, 1869, s. 29-A—*Statement in the will that adopter has been taken in adoption—Will registered and proved—Substantial compliance with the requirement of the section.*

Where the testator had declared in his will which was registered and duly proved that he was taking the plaintiff in adoption, held that his will substantially complied with the requirement of s. 29-A of the Act as s. 29-A does not prescribe any set formula in which such a declaration should be made.

Under s. 29 of this Act even Mohammedan Taluqdars were permitted to adopt a son and obviously in their case no religious ceremony is required and all that they had to do was to make a declaration in a registered document as required by s. 29-A of the Act

Jagat Ranvir Mahesh Prasad Singh v. Smt. Baquidan

547

Natural justice—Essential principles—Quasi-judicial principles to be observed by the Authority—Can evolve its own rules—The essential principles of natural justice that are to be observed by an authority dealing with the cases in quasi-judicial manner are as follows:

(1) The person whose rights are to be affected must be given notice of the case or the charges which he has to meet; (2) he must be given an opportunity to make a representation and to explain the allegation made against him and to have his say in the matter, and (3) the authority conducting the proceedings must not be biased and should act in good faith.

The first two principles imply that the person proceeded against must be informed about the material on the basis of which allegations made against him are founded so that he may have an opportunity of explaining them and putting forward and substantiating his own version. It is open to the authority concerned to evolve its own procedure for acquainting the person concerned with charges and material on which they are founded and also for affording him an opportunity of explaining those charges and putting forward his case. The procedure will vary with the facts, circumstances and nature of case, constitution of authority dealing with it and the rules under which it functions

Triambak Pati Tripathi v. Board of High School and Intermediate Examination (F. B.)

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Prevention of Food Adulteration Act, 1954, s. 2(1)(a)—Accused informing Food Inspector that oil in his possession is non-edible oil—Sample taken by Inspector cannot be said to be adulterated within the meaning of s. 2(1)(a) of the Act—Accused absolved of liability under ss. 7 and 17 of the Act.

When it is established that the accused informed the Food Inspector who had gone in the shop to take sample of the mustard oil that he was selling non-edible oil, it could not be said that the sample taken from the accused is not of the nature, substance or quality, which it purports or is represented to be. When the accused never claimed to have sold pure mustard oil to the Food Inspector, the sample taken possession of by the Food Inspector cannot be said to be adulterated within the meaning of s. 2(1)(a) of the Act and the accused did not commit the offence under s. 7 read with s. 16 of the Act.

Nagar Mahapalika, Varanasi v. Parmeshwar

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Provident Funds Act, 1925, ss. 3(2) and 5—Railways Establishment Code, Vol. I, Chap. XIII and Railway Provident Fund Rules, rr. 1338(1) and 1340(1)(ii)—Special contribution—Subscriber has no right to make nomination

Under r. 1340 (1)(i) the amount of special contribution becomes payable to the widow or widows or dependent children of the deceased subscriber in such shares as the controlling officer may determine. In view of s. 3(2) of the Act, the determined shares of the special contribution shall vest in the mentioned dependents, namely the widows or dependent children.

Since no nomination can be legally made, no occasion will arise to invoke s. 5(1) in regard to special contribution.

—, ss. 3(2) and 5(1)—*Railway Establishment Code, Vol. I, Ch. XIII, and Railway Provident Fund Rules, r. 1338(3) and 1340(1)(i)*—Amount of fund becomes payable to a particular dependant by reason of nomination made by subscriber—Sums to which nomination made vests in him—Nominee will become owner under s. 3(2).

Nominee may be person who is not dependant. If amount exceeds Rs.5,000 and the nominee is not dependant, the amount shall be payable only on production by the nominee of probate or letters of administration. Obviously, if the amount is in excess of Rs.5,000 it is payable to the nominee, if he is a dependant without probate or the letters of administration.

If under the rules an amount becomes payable to a particular dependant by reason of nomination, s. 3(2) will equally apply and the sum to which the nomination relates will vest in the nominee dependant.

In such a case, the nominee dependant will become the owner under s. 3(2). He need not take recourse to s. 5(1) to establish his beneficial interest in such sum.

Bhagwan Singh v. Cango Bai (F. B.) ...

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Punishment and Appeal Rules for Subordinate Services, 1932, r. 1-A (as amended in 1968)—Powers exercised by the appointing authority under—Nature of.

On reading the service rules as a whole the power exercised by the appointing authority is by way of delegatee and not by way of powers exclusively conferred upon him.

Mritunji Singh v. State of U. P.

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Railway Property (Unlawful Possession) Act, 1966, ss. 8(2) and 9—Statements of witnesses recorded during enquiry under—Supply of copies to accused—Necessity of—Omission—effect of—Code of Criminal Procedure, 1898, Chap. XIV, ss. 161, 162 and 173(4).

All provisions contained in Chap. XIV of the Code apply to enquiry made by an Officer of the Railway Protection Force under the provisions of the Act, with the result that the Enquiring Officer will be subject to the provisions contained in ss. 161, 162 and 173(4) of the Code. Enquiring Officer under s. 173 (4) of the Code read with s. 8 (2) of the Act, is under a statutory duty to furnish copies of statements of witnesses recorded by him during enquiry under s. 9 of the Act to accused. Omission to supply of the copies vitiates the trial. In such a case prejudice is patent and will be presumed.

—, 1966, ss. 8(2) and (9) and Code of Criminal Procedure, 1898, s. 162(2)—*Obtaining of signatures of witnesses on statements recorded during enquiry under s. 9—Propriety and effect of.*

An Officer of the Railway Protection Force carrying on enquiry under s. 9 of the Act is prohibited in view of s. 162(2) of the Code read with s. 8(2) of the Act, from obtaining signatures of witnesses on the statements recorded by him during enquiry. The obtaining of signature is likely to create in the mind of witness produced for the prosecution a sense of commitment to the statement signed by him which seriously impairs the value of evidence of that witness at trial.

Indal Singh v. State ...

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Railway Servants (Discipline and Appeal) Rules, 1968, r. 10(5)

(1) (a)—*Compliance of—Finding of Inquiring Authority—Reasons when necessary by Disciplinary Authority.*

Under r. 10 the reasons are necessary if the Disciplinary Authority disagrees with any findings of the Inquiring Authority but in case where the Disciplinary Authority agrees with the Inquiring Authority a statement to the effect that it agrees with the findings of the Inquiring Authority is sufficient compliance of r. 10(5)(a).

—, Sch. 11, nos. 7, 8 and 9—*Show-cause notice—Issue of—Authority competent to—Constitution of India, Art. 311 (2).*

The Disciplinary Authority defined in the rules is entitled to institute disciplinary proceedings only. Under Art. 311(2), Constitution of India as well the authority to show-cause cannot be different from the authority that is competent to impose the punishment.

Ram Dulare v. Union of India ...

120

Special Marriage Act, 1972, s. 16—*Second marriage during the lifetime of first wife not void.*

The act of marriage, a second time, during the lifetime of the first wife married under the Act might have been an offence under s. 16 of the Act and the husband might have been prosecuted for the same but from this it does not follow that the second marriage which was a valid marriage having been performed according to Hindu customary rites became void. S. 16 did not declare such subsequent marriage void.

Smt. Shephali Chatterji v. Smt. Kamla Banerji ...

479

Transfer of Property Act, 1882, s. 54—*Vendee under an agreement to recovery can transfer the property—Sale not illegal*

A vendee under an agreement to recovery the property to his original vendor within a certain time is not legally prevented from transferring the property. If a person is ready and willing, with full notice of such agreement to purchase the property in question and to acquire such title and interest in the property as the original vendee was capable of transferring, it can not be said that he enters into a transaction which is illegal or void.

Dewan Man Mohan Lal v. Piary Lal alias Budh Sain ..	426
—, 1882, ss. 105 and 108(c)— <i>Tenancy for a fixed term—Transfer of tenancy rights to third person by the tenant—Such transferee neither becomes a lessee nor tenant of the original lessor.</i>	

S. 105 of the Act confines the relationship of lessor and lessee to the parties to the contract by which the right of enjoyment of the immovable property is transferred for a certain time express or implied or in perpetuity in consideration of a price paid. The emphasis is on the contractual relationship. There being no privity of contract between the original lessor and the transferee from the lessee, the transferee will not become the lessee or tenant of the original lessor, though such a transferee will be able to enjoy the benefit of the leased property because of the statutory provisions under sub-s (c) of s. 108 of the T. P. Act.

Kunj Behari Lal Gupta v. Sri Shivji Maharaj, Birajman Mandir ..	
Telegraph Wire (Unlawful Possession) Act, 1950, s. 2 (b) — Test.	

A mere visual appreciation of the colour and lustre of the wire coupled with the measurement of the diameter is not sufficient to establish that the wire in question was copper wire which came within the prohibited category of telegraph wire as defined in s. 2(b) of the Act.

—, s. 5— <i>Offence under the section not proved—Conviction under ss. 379 and 411 of the Indian Penal Code, if justified.</i>	
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While mere possession is punishable under the Telegraph Wire (Unlawful Possession) Act, dishonest possession alone is punishable under ss. 379 and 411, I. P. C. If a person can give a reasonable explanation for his possession he cannot be found guilty under ss. 379 and 411, I. P. C. But if the same person was being prosecuted for an offence under the Telegraph Wire (Unlawful Possession) Act, his explanation is of no consequence. Even though his possession might be innocent and honest he would still be guilty under the Telegraph Wire (Unlawful Possession) Act. Thus the ingredients of the offence under the two Acts being different he cannot be convicted under s. 379/411, I. P. C. in the absence of a charge.

Gauri Ram v. State of U. P. ...	388
U. P. Consolidation of Holdings Act, 1953, s. 30(b), Agricultural plots sold with a right to re-purchase—Old plots included in a new chak during consolidation proceedings—The liability to re-sale continues even in the new chak irrespective of change of identity of plots.	

S. 30 speaks of the liability of the tenure-holder. The liability should be in respect of his old holdings. It need be a liability which attaches itself to the land like a charge. If the

tenure-holder was under some legal liability, he would continue to remain subject to it.

The duty of the seller to execute a proper conveyance of the property agreed to be sold is a liability of the seller recognised by the law. It is an enforceable legal liability, which relates to the land mentioned in the agreement and such liability is transferred to new *chak*.

S. 30 includes a liability under s 55(1)(d), Transfer of Property Act, and such a liability is enforceable against a tenure-holder in respect of a new *chak*.

Shanti Prasad v. Akhtar

162

—, 1953, ss. 4, 5, 6, 7, 8, 9(2) 9-A and 49—*Constitutionality of—Powers of the State Government under ss. 4 and 6 to place some village under consolidation while excluding others, if arbitrary—Different procedure for correction of revenue records—Different set of courts and different right of appeal and revision prescribed under, if, discriminatory—Provisions, not hit by Art. 14 of the Constitution.*

—, ss. 9(1)(a) and 9(2)—*Word "Person" includes "Gaon-Sabha" and "State Government"*

The Goan Sabha is covered by the word "person" occurring in ss 9(1)(a) and 9(2) of the A.C. The word "person" is also wide enough to include the State Government unless such inclusion would be repugnant to the context in which the word is used in the sections.

Shyam Sunder v. Siya Ram

368

—, 1953, s 12 of the Act is not affected by r. 9 of O. XXII, C. P. C.

An objection under s. 12 of the U. P. Consolidation of Holdings Act not being a suit is not affected by O. XXIII, r. 9, C. P. C. and an objection under s. 12, consequently not barred.

Kamal Ahmad v. Deputy Director, Consolidation

347

—, 1953, ss. 48 and 52—*Notification under s. 52 issued.—Revision under s. 48 filed afterwards—Revision is maintainable and should be decided on merits*

Right of a litigant to take the proceedings to a superior court, if an adverse order is passed against him, comes into existence the moment a proceeding is initiated and it continues till the *lis* continues. The right is to be governed by the law prevailing at the date of institution of the suit or appeal and not by the law that prevails at the date of the decision or at the date of filing of appeal.

On the filing of a claim or objection before Consolidation Officer, certain rights vested in a party to take the proceeding to the superior authorities, could not be taken away by a subsequent enactment unless it was expressly or by necessary implication so provided. There is nothing in s. 52 of the Act which either expressly or by necessary implication takes away that right.

Dilawar Singh v Gram Samaj	244
U.P. Control of Goondas Act, 1970. ss. 3(3) and 3(1) (a) (b) (c)— <i>Order under s. 3(3)—District Magistrate to be satisfied as to existence of conditions mentioned in cls (a), (b) and (c) of s. 3(1).</i>	
An order under s. 3(3) of the Act cannot validly be made unless the District Magistrate is satisfied as to the existence of each one of the conditions mentioned in cls (a), (b) and (c) of s. 3(1). Cl. (c) of s. 3(1) of the Act cannot be confined to the non-availability of witnesses in a criminal case pending on the date on which the order is passed by the District Magistrate.	
——, s. 3(1)(a), (b) and (c)— <i>Notice—General nature of the material allegations missing—defect fatal.</i>	
The defect of not setting out the general nature of the material allegations in the notices is a fatal defect as it results in non-compliance with the provisions of s. 3(1). The notices cannot be deemed to be notices under s. 3(1).	
Haish Natan alias Harshu v. District Magistrate	412
——, 1970, ss. 4(1) and 3(3) and Constitution of India, Art 19.	
The provisions of s. 3(3) of the Act are not unconstitutional, <i>ultra vires</i> or void.	
The powers contained in s. (3) can, if exercised, affect the fundamental rights of a person guaranteed under cls. (d), (e) and (f) of Art 19 of the Constitution. The entire section is a composite section and the various sub-sections and clauses have to be interpreted and construed in the light of what is contained in sub-s. (1) of s. 3. The interpretation of sub-s. (3) will also have to be made keeping in view the purpose of the enactment and object to be achieved by the order. The heading of the enactment, viz. "The Uttar Pradesh Control of Goondas Act" shows that the purpose of the Act is to control the nefarious activities of unsocial elements. The preamble of the Act and the definition of the term 'Goondas' also shows that a Goonda is a person who carries on activities which are against the people and which, if permitted, are likely to endanger the interest of the general public. Sub-s. (1) of s. 3 also points to the same conclusions. The power given by s. 3(3) to the District Magistrate contains a law made in the interest of the general public as contemplated by cl. (5) of Art. 19, of the Constitution.	
Raja v. State of U. P.	19
U. P. Co-operative Societies Act, 1912, s. 137 (ii) — <i>Award by the Arbitrator—Execution in court—The executing court has no jurisdiction to go behind the award and to scrutinise it.</i>	
It was not open to the court below sitting as an executing court to go behind the award or to question the correctness of any finding given by the arbitrator, nor it had any power to record its own finding on a question which presumably was a question of fact. If an executing court is held to be entitled to question the correctness of a finding of fact recorded in a	

judgment or a decree or an award which is being executed, it would virtually amount to converting the executing court into an appellate court.

Tilhar Sahkari Kraya Vikraya Samiti Ltd. v. Ram Swarup ..

719

U. P. Foodgrains (Restriction on Hoarding) Order, 1966 as amended in 1967—Validity of—Essential Commodities Act, 1955, ss 3 and 5(b).

Where the Central Government by notification under s. 5(b) of the Essential Commodities Act directed that its powers under sub-s. (1) of s. 3 of the Act to make orders to provide for the matters specified in cls. (a) to (f) and (h) to (j) of the sub-s (2) shall, in relation to foodstuffs be exercisable also by the State Government and in pursuance of it the State Government issued the U. P. Foodgrain (Restrictions on Hoarding) Order whereby it fixed a quantitative limitation on the hoarding of grain by the licensees in Form B under the U. P. Foodgrains Dealers Licensing Order, 1964.

Held, the power to pass an order fixing a quantitative limitation on the hoarding of grain is not within specific power under cl. (d) of sub-s (2) of s. 3 of the Essential Commodities Act. It is within the general power under sub-s. (1) of s. 3, this power was not delegated to the State Government with the result the impugned order was beyond the scope of the delegated authority of the State Government and as such was illegal and void.

State of U. P v Suraj Bhan Pandey ..

53

U. P. Industrial Disputes Act, 1947, s 3(b)—Power under the section—To be exercised in acute emergency and as a temporary measure—Exercise.

The State Government can exercise the power conferred by cl. (b) of s. 3 of the above Act only as a temporary measure and in cases of acute emergency where mere resort to power to refer for adjudication may be inadequate to meet the situation and is not an alternate to the power to refer for adjudication an existing industrial dispute, much less to resolve the industrial dispute unilaterally.

Held, that the exercise of the power under s. 3(b) was arbitrary and void and hence the notification was quashed.

State of U. P v. Prem Spinning and Weaving Mill Co. ..

633

—, 1947, ss. 6-E (2) and 6-F—Pendency of bonus dispute—Dismissal of employee without approval of Tribunal—Order not invalid—Employee can complain to the Tribunal—No time limit for such complaint.

S. 6-F gives a right to the aggrieved workman to make a complaint to Labour Court or Industrial Tribunal if the provisions of s. 6-E have not been complied with and thereby achieve the same object which could be achieved on a reference under s. 4-K of the Act. Non-compliance of requirement

of s. 6-E of the Act only enables the aggrieved workman to make a complaint under s. 6-F of the Act and not of rendering the order of punishment invalid on this ground alone.

From a perusal of the Act it is apparent that it does not prescribe any period of limitation for making a complaint under s. 6-F. Even so the complainant is expected to approach the Tribunal within a reasonable time but simply because the complainant is guilty of laches it does not affect the jurisdiction of the Tribunal to entertain the complaint and condone the laches.

Paras Nath Misra v. U P State Industrial Tribunal 327

U. P. Municipalities Act, 1916, ss. 8 and 298—Area falling outside the limits of the Municipal Board—Board's power to frame bye-laws for such an area.

The Municipal Board has power to frame bye-laws for an area outside the Municipal limits by virtue of powers conferred by s. 8(1) read with s. 298 of the Act provided it has obtained the sanction of the prescribed authority.

Municipal Board, Fairukhabad v. Babu Ram 171

—, 1916, s. 8(1)(a)—*Purpose of acquisition of land—Construction of buildings, their compound and for new public streets.*

Held, that the land could be acquired under s. 8(1)(a) of the Act both for the purpose of laying out new public streets and also for construction of buildings and their compound.

—, 1916, and U. P. Town Improvement Act, 1919, s. 66 and para. 10(3) of the Schedule—*Land acquired under s. 8(1)(a) of the former Act—Compensation payable under s. 66 and para 10(3) of the Schedule of the latter Act—Use of the land on the date of notification under s. 4, Land Acquisition Act, 1894.*

It the purpose for which the land was sought to be acquired fell squarely within the ambit of s. 8(1)(a) of the U. P. Municipalities Act and the provisions of s. 66 of the Town Improvement Act were attracted then under para 10(3) of the Schedule appended to the Town Improvement Act, compensation was payable on the market value according to the use to which the land was put at the date of the notification under s. 4 of the Land Acquisition Act

Business Co operation Ltd., Ghazibad v. State of U. P. ... 764

—, 1916,—*The term "manner" in s. 10(c),—Includes the power of specifying the category of persons.*

The word "manner" in the phrase "the manner of election" would include the power of specifying the category of persons who will form electoral college. Since in a Board constituted under s. 10, there were two classes of members; it may have been

thought necessary to expressly authorise the State Government to specify the class of members who may elect the President, because the term "manner of election" was wide enough to include such specification.

—, 1916, s 10(c)—*The phrase 'and be elected in such manner' occurring in cl. (c) of s 10—Scope.*

The phrase "and be elected in such manner" occurring in cl. (c) is wide enough to include the prescribing whether the election of the President will be by the elected members only or by both elected and nominated members. The prescribing of the electoral college being within the purview of cl. (c), the State Government was within its authority in prescribing in the notification dated 18th December, 1964 that the elected and nominated members shall elect the President and the participation of the nominated members in the election of the President was valid

—, 1916, s. 43—*Nominated members—Not entitled to vote at the election of the President.*

Nominated members were not intended to be within the purview of s 43 which was confined to election of President of a Municipality constituted under s. 9. It has no application to a Municipal Board constituted under s 10

Jagdish Shah v. State of U. P.

708

—, 1916, s. 39—*Genuineness of the resignation—State Government to hold enquiry and satisfy itself about it.*

S 39 of the U. P. Municipalities Act does not provide for holding any enquiry or for passing any order of acceptance but the State Government is under a duty to satisfy itself about the genuineness of the resignation letters and for that purpose it may hold enquiry for its own satisfaction.

Rameshwar Das Mittal v State of U. P.

617

—, 1916, s. 87-A—*Powers of District Magistrate under—Exercise of, by an Additional District Magistrate invested with powers of District Magistrate under s. 10(2) of the Code—Code of Criminal Procedure 1898, ss. 10(2) and 11.*

An Additional District Magistrate who is invested with all the powers of the District Magistrate under s 10(2) of the Code of Criminal Procedure can validly exercise the powers of the District Magistrate under s. 87-A of the Municipalities Act during the temporary absence from duty of the District Magistrate or even in his presence. The holding of temporary charge of the district by an A. D. M. [not invested with the powers of D. M. under s 10(2) of the Code] during the casual leave of the D. M. does not authorise him to exercise the powers of D. M. under s. 87-A. The D. M. does not possess any power to appoint any other officer during his absence from duty, as a District Magistrate within the meaning of s 10(1) or 10(2) of the Code. Office of the District Magistrate, during such casual leave could not be deemed to be vacant within the meaning of s. 11 of the Code. Functions of the District Magistrate under sub-ss. (1), (3) and (4) of s. 87 A of the Act are statutory functions which could not be

delegated by the District Magistrate to any other officer who was not otherwise competent to discharge those functions.

—, s. 87-A—*Mode of voting*

No mode of voting has been prescribed by s. 87-A. It is in the discretion of the Presiding Officer to adopt any reasonable method of counting votes for and against the motion. The method of counting votes by show of hands is one such method.

Shyam Behari Lal Khundsari v. State of U. P. ... 101

—, 1916 s. 128(i)(vii), rr. 3 and 4, item 10(b)—*Unloaded vehicles passing through Municipality—Not liable for toll—Only transit pass fee to be realised.*

R. 4 read in the context of other rules and the Schedule applies to an empty vehicle or conveyance mere passing through the municipality, en route to an outside destination. Such a vehicle is liable to pay a transit fee, and as such under r. 3 is not liable to pay toll.

—, s. 128(i)(vii), item 10(b)—*The driver of the vehicle is not liable to pay toll.*

Since the vehicles which are only in transit are liable to pay transit fee, the driver of such vehicle could not be held liable to pay toll when the transit fee has been paid.

City Board of Mussoorie v. Amolak Ram Oberai 251

—, 1916, s. 218, List I, Part A, cl. (h) (viii)—*Word "Sanitation",—Meaning and scope of—Bye-law requiring to leave four feet open space between a building and a road—Power of Municipality to make.*

Sanitation is a very wide word. It is not confined to the interior of the building. Sanitation contemplates the surroundings of the buildings as well. The provision of having an open space left by the side of the building in between the building and the lane or road may be necessary for the upkeep of the sanitation of the building concerned. As such, the power to frame a bye-law requiring to leave an open space as stated above, could be exercised by Municipal Board under sub-cl. (viii) of cl. (h) of List I (Part A) referred to in sub-s. (2) of s. 293 of the Act. The bye-law could very well have been framed in exercise of the power contained in sub-s. (1) of s. 298 of the Act.

Bashir Ahmed v. State ... 340

U. P. Panchayat Raj Act, 1947, s. 95(1) (g)—*Removal of Pradhan from office—Proceeding for—Affects his rights and involves civil consequences—Principles of natural justice applicable to such enquiry.*

Principles of natural justice fully apply even if the enquiry is administrative in nature, provided it affects the rights of the charged officer and involves civil consequences. A proceeding for the removal of a Pradhan from the office to which he was elected clearly affects his rights and involves civil consequences upon him. Such an enquiry can only be made consistently with the principles of natural justice.

9 H. C. (I L R)—5

Held on facts, that principles of natural justice were complied with in this case.

Abdul Wahab *v.* District Magistrate (F. B.) ...

493

U. P. Sales Tax Act, 1948, s. 3-A—*Notification no. ST-1356/X-990-56, dated 1st April, 1960—Entry no. 33 as amended in 1965—Pumping sets are agricultural implements.*

Pumping sets in question are connected intimately with agriculture and are commonly used and understood as agricultural implements.

Engineering Traders, Meerut *v.* State of U. P. (F. B.)

777

U. P. (Temporary) Control of Rent and Eviction Act, 1947, s. 3(1)(a)—*Lawyer's notice for arrears of rent and ejectment—Money sent to lawyer within one month—No default.*

Once a duly instructed lawyer is a 'landlord' competent to send a notice of demand there is no reason why it should not be held as a matter of law that he is competent to accord satisfaction to the tenant who tenders the amount of arrears to him.

When an agent or attorney is authorised to make a demand by notice and that person in compliance with the notice tenders the requisite sum of money or chattel to the agent, it would be compliance of the notice of demand.

Held, that the notice of demand was complied with by the defendant-tenant and he was not in default

Noor Mohammad *v.* Nanwa ..

167

U. P. Tenancy Act, 1939, s. 4(1)—*Agreement between co-tenant-holders about their shares—Decree passed on such agreement—Landholder was not a party in the agreement nor was it for his interest—Agreement is void*

The provisions of s. 4(1) must be held to govern an agreement between the landholder and a tenant. The language of s. 4(1) and (2) read as a whole coupled with the object sought to be achieved by the provisions, makes it clear that the section governed agreements between the landholder and tenant. It did not apply to agreements between co-tenants *inter se*, without either the intervention or participation of or any benefit to the landlord.

The agreement upon which the compromise decree was based, was between the co-tenants themselves. The landholder was not a party to it. Such an agreement was outside the purview of s. 4 of the Tenancy Act and was void.

Champa Kunwar *v.* State of U. P. ...

755

U. P. Tenancy (Amendment) Act, 1947, s. 27—*Proceeding of reinstatement under s. 27 can continue even after enforcement of U. P. Z. A. and L. R. Act.*

Proceedings under s. 27 of the Amendment Act are proceedings under the U. P. Tenancy Act, 1939. They are proceedings in respect of a right or obligation or liability acquired or incurred under the Tenancy Act, because these proceedings have the effect of nullifying the previous operations of decrees

for ejectment passed under ss. 163, 171 and 180 of the principal Act. The proceedings under s. 27 were within the purview of the U. P. Land Tenures (Legal Proceedings) Removal of Difficulties Order, 1952, and hence could validly continue and be decided in accordance with the provisions of the Tenancy Act read with the Amending Act, 1947, notwithstanding their repeal

——, s. 27(3) and (5) and U. P. Z. A. and L. R. Act, 1950, ss 21 and 201—*Ejectment of hereditary tenant—Another person inducted on reinstatement becomes a hereditary tenant.*

The effect of reinstatement of the applicant is nullification of the operation of the decree for ejectment. His rights and liabilities existing on the date of ejectment revive. They are not conferred afresh. On reinstatement the original hereditary tenant becomes the hereditary tenant of the holding with the same rights and liabilities. A subsequently inducted tenant does not become a Sirdar under s. 19 of the Z. A. Act on the footing that he was a hereditary tenant of the holding on June 30, 1952. He becomes an Asami under s. 21 of the Act liable to ejectment under s. 202 of the U. P. Z. A. and L. R. Act.

Ramesh Chand v. Board of Revenue (F B)

601

U. P. Town Improvement Act, 1919, s. 8(1)—*Commencement of the terms of Chairman and trustees—Notification not necessary—Trustees can function and the Improvement Trust can act.*

There is no provision in the Act requiring that the Improvement Trust shall not start functioning till a notification under s. 8(1) is made. The provisions under s. 8(1) were made only for the purposes of determining when the term of the first trustee will come to an end so that first trustee may be nominated. Even if no notification under s. 8(1) was issued at the time of nomination of the trustees they could function and the Improvement Trust could act

Khadim Husain v. State of U. P

727

——, 1919, s. 66 and Schedule, para 10(3)—*Constitution of India, Art. 14—Rights in the acquired land extinguished before the commencement of the Constitution—Reference alone pending—Appellant not entitled to claim protection of Art. 14 of the Constitution*

Where it is not disputed that the provisions of s. 66 of the Town Improvement Act and the Schedule annexed thereto were valid laws when enacted and continued to be so till the Constitution came into force, the mere fact that the reference application came to be decided after the Constitution would not entitle the appellant to challenge the validity of the principles on which the compensation had to be assessed. He had no right which could survive the Constitution so as to enable him to claim the protection of Art. 14 of the Constitution

Business Co-operation Ltd., Ghaziahad v. State of U. P.

764

U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 4—
Compromise decree before the date of vesting—Loses its force by change of law and does not operate as res judicata.

A compromise decree is not based upon any decision of court. It represents an agreement between the parties to which the seal of the court is super added. By compromise the parties decided rights themselves within the provisions of the then existing law. If the law which governed the rights of the parties, is extinguished by a subsequent statutory enactment, the operation of the compromise decree would vanish with it. Such a compromise decree would no longer be enforceable or binding.

Champa Kunwar v. State of U. P. . . .

755

—, 1950, s. 18(2) and U. P. Agricultural Tenants (Acquisition of Privileges) Act, 1949, s. 6—*Declaration under s. 6.*

A person who had obtained a declaration under s. 6 of the Acquisition of Privileges Act continued to be a tenant till the date of vesting and acquires a status of *bhumidhar* only on the date of vesting under s. 18(2) read with s. 130 of the Act as a consequence of the acquisition of estate.

Jangi Lal v. Ram Jas . . .

701

—, 1950, ss. 19, 20 (a) (ii) and 342—*Whether sub-tenant under s. 27(3) of Tenancy (Amendment) Act, 1947, becomes a ridar under U. P. Z. A. and L. R. Act or an asami under s. 21 liable to ejectment.*

Under s. 20(a)(ii) a sub-tenant becomes an Adhivasi; but there is an express exclusion of a sub-tenant referred to in the proviso to s. 27(3) of the Amending Act of 1947. A person declared to be sub-tenant under the proviso does not acquire Adhivasi rights. The subsequently inducted person becomes an *asami* under s. 21 and hence under liability to ejectment under s. 202 of Z. A. and L. R. Act.

The declaration of rights having retrospective effect the person so declared to be entitled to reinstatement as a hereditary tenant will be deemed to be the hereditary tenant on the date preceding the date of vesting, the subsequently inducted tenant being deemed only a sub-tenant, s. 342 acts as a proviso or an exception to s. 190.

Ramesh Chand v. Board of Revenue (F. B.) . . .

601

—, 1950, s. 20(a)—*Mortgagee in possession of—Not covered by expression "Occupant" mentioned in s. 20(a).*

A mortgagee in possession occupies the land on behalf of the mortgagor as security for the money advanced by him. He is not an "occupant" within cl. (a) of s. 20 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act.

—, s. 20(b)(i)—*Entry of mortgagee—Not referable to occupant—No adhivasi right can be acquired under such entry.*

The provisions of s. 20(b)(i) of U. P. Zamindari Abolition and Land Reforms Act clearly indicate that the entry as mortgagee is not intended to refer to occupants, who are treated as a class

by themselves consisting of persons who are occupying land without title or without the consent of the person whose name is entered in col. 5 of the Khasra.

They did not acquire *adhivasi* rights under s. 20, cl. (b) (i) of the Act

Mustafa Khan v. Deputy Director, Consolidation 679
 —, 1950, ss. 20 (a) (i), (b) (i), 21(1) (h) and 16—*Tenant of sir—Person so recorded in the records of 1356 F.—No acquisition of adhivasi rights under s. 20 (b) (i).*

A person, who is, in fact, a tenant of *sir* and claims *adhivasi* rights under s. 20(b) (i), can acquire such rights only under this provision and even if he can be considered to be a recorded occupant by virtue of the fact that he is entered as a tenant of *sir* in the records of 1356 F. he cannot acquire *adhivasi* rights under s. 20(b) (i). The acquisition of *adhivasi* rights by him under s. 20(b) (i) can only be defeated if it is shown that he is a tenant of *sir* land referred to in sub-cl. (a), cl. (i) of the explanation under s. 16 and his landholder was, on the relevant dates, a disabled person in which case he will acquire only *asami* rights under s. 21(1) (h). The question whether he can be considered to be a recorded occupant or not, does not affect the acquisition of *adhivasi* or *asami* rights by him.

Radha Kishori v. Joint Director of Consolidation 270
 —, 1950, s. 20(a)(ii)—*Usufructuary mortgage—Mortgagee not a sub-tenant—Liable to be ejected.*

A usufructuary mortgagee does not acquire the status of a sub-tenant. He is entitled to remain in possession as a person who has a right to occupy subject to the covenants of the transaction. Such a transaction does not make the mortgagee a sub-tenant within the meaning of various Tenancy Acts. The term of contract between the parties is essentially only to transfer the actual occupation on an agreement that the occupation would cease on the principal amount being paid. He does not become an *adhivasi*.

Ram Khilawan v. Bansi .. 487
 —, s. 176 and r. 157—*Suit for partition of holding—Civil Court decree on the basis of compromise—Decree without jurisdiction.*

Where soon after the institution of the suit in the Civil Court the parties filed a compromise praying that the parties to the suit may be allotted shares in accordance with that compromise and the Civil Court passed a decree in terms thereof without referring the matter to the Collector held; that such a decree would be without jurisdiction and not operative or binding between the parties.

Jai Ram Singh v. Settlement Officer (Consolidation) 473
 —, 1950, s. 230-A—*The word "retain" in Expl. 1 to s. 230-A—Person evicted from the land after 20th June, 1948 has the right to restoration of possession.*

The phrase '(retain possession)' obviously can apply only in a situation where the person was in fact in possession; but if

he for some reason was not in possession, he was entitled to sue for restoration of possession under s. 232. In the context of the main section, the first explanation would carry some sense only if the word "retain" was read as "take" or "regain" and so read the claim for restoration of possession would be maintainable.

Kamal Ahmad *v* Deputy Director of Consolidation 347
 —, s. 232—*Possession voluntarily given up before the date of vesting—Application for restoration of possession still competent.*

Where the applicant lost possession by voluntarily giving it up before the date of vesting his application for restoration of possession is maintainable.

—, 1950, s. 21(1)(c) and U P Tenancy (Amendment) Act, 1947, s. 27(3)—*Proviso to s. 27(3)—Person declared sub-tenant under the proviso becomes asami under s. 21(1)(c) of the U. P. Zamindari Abolition and Land Reforms Act*

The scheme underlying these provisions is that if courts have declared a person to be a sub-tenant under the proviso, he will become an *asami* and no one else would become an *adhivasi* in respect of that land, even though he may have been recorded in the revenue papers of 1856 F. But if there was no such sub-tenant and there is only a re-instated tenant under s. 27(3), then a person who had been recorded as an occupant of such land will become an *adhivasi* under cl (b) (1). The erstwhile re-instated tenant shall lose his right.

Land referred to section in the proviso to sub-s. (3) of s. 27—Not equivalent to land mentioned in s. 27(3).

Land referred to in the proviso to s. 27(3) does not mean the land referred to in s. 27(3) itself.

Fateh Singh *v* Board of Revenue 238
 —, 1950, ss. 240-G and 191—*Proceedings under Chap. IX-A becoming final by award of compensation—Original bhumi-dhar's rights extinguished—Gram Samaj cannot take possession on the death of such landholder where he dies heirless.*

The result of compensation statement becoming final *inter alia* was that as between D and the State there came into being a binding adjudication that the rights, title or interest of D had ceased and stood acquired by and vested in the State. D did not leave any rights, title or interest in the land in question at the time of her death. They had already ceased during her lifetime and stood acquired by and vested in the State. As such on her death she left no holding or part of holding thereof over which the Land Management Committee of Gram Samaj could become entitled to take possession as contemplated by s. 194(c) of the Act.

Bansraj *v*. State of U. P. ... 697
 —, 1950, s. 269—*Transfer of occupancy tenancy—Possession of the transferee—Nature of—Adverse to transferor—Not permissible.*

If the document of sale is invalid the transferee gets no title under it. His possession will not be referable to any legal title, it would be adverse to the transferor.

Held, that the possession of transferee from the date of the transfer of occupancy tenancy was adverse to the transferor and was not permissible on behalf of the latter.

Bharit v. Board of Revenue . . .

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—, 1950, s. 333 and Rules, r. 115-N—*Auction by Land Management Committee of abadi site—Set aside by S. D. O. under s. 115 N—Revision lies to Board of Revenue.*

A revision lies to the Board of Revenue under s. 333 of the U. P. Zamindari Abolition and Land Reforms Act against the order of an Assistant Collector incharge of subdivision (S. D. O.) passed under r. 115-N of the U. P. Zamindari Abolition and Land Reforms Rules, setting aside an auction of the *abadi* site by Land Management Committee.

Krishna Devi v. Board of Revenue . . .

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Workmen's Compensation Act, 1923, s. 3(1)—*Workman injured during the course of his employment—Accident not arising out of employment—Compensation under s. 3(1) cannot be allowed.*

(*Per Majority M. N. SHUKLA and K. N. SETHI, JJ., S. CHANDRA, J., contra*): It is not enough that the accident took place in the course of employment and it must be further established that it arose out of the employment. The words 'out of' and 'in course of employment' are used conjunctively and not disjunctively. What arises in the course of the employment is to be distinguished from what arises out of the employment. The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment—that is, directly or indirectly engaged on what he is employed to do—gives a claim to compensation, unless it also arises out of employment.

Abida Khatun v. General Manager, Diesel Locomotive, Varanasi (F. B.) . . .

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APPELLATE CIVIL

Before Mr. Justice K. B. Asthana

KUNJ BEHARI LAL GUPTA ... APPELLANT,

v.

1972
February, 4.

SHRI SHIVJI MAHARAJ, BIRAJMAN MANDIR

AND ANOTHERS ... RESPONDENTS.

Transfer of Property Act, 1882, ss. 105 and 108(c)—Tenancy for a fixed term—Transfer of tenancy rights to third person by the tenant—Such transferee neither becomes a lessee nor tenant of the original lessor.

S. 105 of the Act confines the relationship of lessor and lessee to the parties to the contract by which the right of enjoyment of the immovable property is transferred for a certain time express or implied or in perpetuity in consideration of a price paid. The emphasis is on the contractual relationship. There being no privity of contract between the original lessor and the transferee from the lessee, the transferee will not become the lessee or tenant of the original lessor though such a transferee will be able to enjoy the benefit of the leased property because of the statutory provisions under sub-s. (c) of s 108 of the T. P. Act.

Second Appeal no. 1568 of 1971 from the judgment and decree of CHANDRA MOHAN, Civil and Sessions Judge, Moradabad, dated May 26, 1971, in Civil Appeal no. 84 of 1971.

S. P. Gupta, for the Appellant.

K. C. Agarwal, for the Respondents.

K. B. ASTHANA, J:—Kunj Behari Lal has filed this appeal from a concurrent decree of his eviction from an accommodation, which comprised a building and open land, of which the plaintiff-respondent, Shivjee Maharaj, Virajman Mandir is the landlord.

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The facts necessary for understanding the controversy involved in this appeal may be briefly stated as follows :

The building and the open land appurtenant to it, enclosed in a compound, originally were the property of Chhitarmal, who endowed the same to Shivjee Maharaj. By a deed of lease dated 30th October, 1937 the said properties were demised for a period of 20 years on an annual rent of Rs.108 to Lala Ratan Lal for the purpose of doing business by installing machinery on the land and raising constructions with the condition that the already existing constructions or the building were to be used by him and on the expiry of the term of the lease the vacant land and the existing building as such would be restored to the possession of the lessor and the lessee would be entitled to remove the superstructures of the construction raised by him during the subsistence of the lease. On 2nd September, 1952 by a deed of assignment Lala Ratan Lal transferred the lease-hold rights absolutely to the plaintiff, Kunj Behari Lal, and delivered possession to him. It has come in evidence on record that Lala Ratan Lal had raised certain constructions as permitted by the terms of the lease and they were also transferred to Kunj Behari Lal, who as assignee came into possession of the premises so demised. Lala Ratan Lal did not pay any rent to the plaintiff-landlord after he had made the assignment on 2nd September, 1952 and the half-yearly rent sent by money orders by Kunj Behari Lal, the assignee, as per terms of the lease was always refused by the plaintiff-landlord. It appears from the evidence on record that the last money order sent by Kunj Behari Lal was refused in October, 1965 by the plaintiff-landlord. By a

notice dated 21st August, 1965, which was a composite notice, addressed to Lala Ratan Lal and Kunj Behari Lal, served upon them on behalf of the plaintiff-landlord, a demand was made from Lala Ratan Lal for payment of the arrears of rent within one month of the receipt thereof and the tenancy was terminated under s. 106 of the Transfer of Property Act on the expiry of the period of one month from the service of the notice. Lala Ratan Lal did not pay the arrears as demanded by the notice and Kunj Behari Lal did not vacate the premises by delivering possession to the plaintiff-landlord on the expiry of one month from the date of the service of notice. In the said notice, paper no. 7-A on record, Kunj Behari Lal was described as a sub-tenant of Lala Ratan Lal. Since the plaintiff-landlord failed to get vacant possession of the premises let out, the suit giving rise to this appeal was filed in the court of the Munsif of Chandausi. It was alleged, *inter alia*, in the plaint that though the lease, according to the terms thereof, stood determined on 31st October, 1957 yet no suit was filed because the defendants always represented to the plaintiff's representative that they would be soon vacating the premises and the relations being good between the parties the plaintiff's agent did not file the suit and waited for amicable settlement. Subsequently when it appeared that the defendants had no intention of acting upon their promise a notice was served on 21st August, 1965, demanding the arrears of rent and terminating the tenancy. On the pleadings in the plaint Ratan Lal, who was impleaded as the first defendant, seems to have been treated some kind of tenant holding over or as statutory tenant and the tenancy

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was treated as one at will that is a monthly tenancy while Kunj Behari Lal, who was impleaded as second defendant, was described as a sub-tenant. In order to get over the bar of s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, it was pleaded that the first defendant was in default in payment of rent despite a demand by notice and that the defendants were guilty of making material alterations without the consent of the landlord in the accommodation let out.

The first defendant, Ratan Lal, did not take any interest in the proceedings beyond filing a written statement saying that he had transferred the lease-hold rights to the second defendant, Kunj Behari Lal, and he being no longer in possession was not interested. The second defendant, Kunj Behari Lal, raised a serious contest. He denied the allegation of the plaintiff in regard to material alteration and also pleaded that he being the tenant, as an assignee, was not in default as he had been tendering rent regularly in terms of the lease which tender was wrongly and illegally refused by the plaintiff-landlord and that no notice of demand of arrears of rent or terminations of his tenancy having been served upon him, he was not liable to be evicted and the suit of the plaintiff as against him was barred by the provisions of s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act.

Above then is the brief summary of the material pleadings of the parties.

The learned Munsif framed the necessary issues and having found on all material points of law and fact in favour of the plaintiff, decreed the suit. It was held that the first defendant was a statutory tenant from month to month after the determination of the lease and the

second defendant was a sub-tenant. It was also held that the first defendant, as the chief tenant, having defaulted in payment of rent, was liable to be evicted, as also he being guilty of making material alterations was liable to be evicted and the suit of the plaintiff was not barred by s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act. On appeal by the second defendant the learned Civil Judge, who heard the appeal, dismissed it substantially on the ground that the first defendant, who was the chief tenant, not having appealed from the decree of eviction, the appeal by the second defendant, who was only a sub-tenant, was infructuous and incompetent. The learned Judge briefly referred to the legal position arising from the assignment made by the first defendant in favour of the second defendant of the lease-hold rights and agreed with the view taken by the court below that the transaction amounted to creation of a sub-lease. The learned Civil Judge did not record any finding on the question of material alterations having been made by the defendants.

The main controversy in this appeal centres round the question as to what was the legal status of Kunj Behari Lal, the second defendant. Whether he was a tenant in his own right of the plaintiff-landlord, as an assignee of the term, or was a sub-tenant, or/was simply in occupation on behalf of the first defendant—Ratan Lal, or was a trespasser in possession of the accommodation in dispute are some of the questions which fell for determination on the learned arguments addressed before me at the bar.

Sri S. P. Gupta, appearing for the defendant-appellant, contended that Kunj Behari Lal, as an assignee of the term, became a tenant in his own right of the plaintiff-landlord by virtue of the privity of estate vesting in him and rent being payable by him for the demis-

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ed property to the plaintiff-landlord he would be covered by the definition of 'tenant' under the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter described as the Rent Control Act). Reliance was placed by the learned counsel on para. 640 of Chap. IV of Foa's General Law of Landlord and Tenant, Eighth Edition. In the said paragraph the learned Author writes "The relationship of landlord and tenant may be created by assignment where the lessee assigns his term, or where the lessor assigns his reversion. The former assignment creates the relationship of landlord and tenant between the lessor and the assignee; the latter creates it between the assignee and the lessee;" A decision of Calcutta High Court in *Krishna Das Nandi v. Bidhan Chandra Roy* (1) was also cited in support of this contention, wherein the learned Judges observed that "under the General Law of Transfer of Property Act a tenancy is transferable in the absence of any contract to the contrary and the transferee becomes on such transfer a tenant under the General Law".

The deed of transfer by Ratan Lal in favour of Kunj Behari Lal, dated 2nd September, 1952 is paper no 18 on record. It clearly shows that Ratan, Lal transferred his term to Kunj Behari Lal on the condition, *inter alia*, that Kunj Behari Lal will pay the rent, under the terms of the lease, direct to the landlord. Kunj Behari Lal on the basis of the transaction evidenced by the said deed came into occupation of the premises demised by the plaintiff-landlord to Ratan Lal by the deed, dated 30th October, 1937. When this happened the term under the original deed of lease was still to run for about 5 years. There cannot be any doubt that if what Foa's says in para. 640, quoted above, and if the Calcutta

(1) A I R. 1959 Cal. 181.

view in *Krishna Dass Nandi v. Bidhan Chandra Roy* (1) as interpreted by the learned counsel is the law, then a relationship of landlord and tenant would be created between the plaintiff and Kunj Behari Lal. But I find some difficulties in the way of Sri S. P. Gupta, the learned counsel for the defendant-appellant. It was observed by the Judicial Committee of the Privy Council in the case of *Hansraj v. Bejoy Lal*. (2) "The Transfer of Property Act, 1882, though founded on English Law and drafted in the first instance by eminent lawyers in England, has only applied the English Law in so far as it was considered applicable to India. Before, therefore, resorting to English decisions for determining the relations of landlord and tenant it should be seen what the law of India is". I have, therefore, to determine the question of legal relationship between the plaintiff and the second defendant primarily on the basis of the provisions of the Transfer of Property Act read with the material provisions of the Rent Control Act.

It is true that the Transfer of Property Act is not exhaustive of the law relating to property but in regard to subject-matters which have been codified under that Act, I think, it is only such provisions which will govern the rights and liabilities of the parties. Chap. V of the Transfer of Property Act deals with leases of immovable property. That Chapter contains a catena of sections as to what is a lease, who is lessor and who is lessee; how leases are made, what are the rights and liabilities of the lessor and the lessee, the determination of the lease and certain other topics have been dealt therein. S. 105 of the Act says "a lease of immovable property is a transfer of right to enjoy such property, made

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for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms". This section further says "the transferor is called the lessor, and the transferee is called the lessee". Sub-s. (c) of s. 108 of the said Act lays down that the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption and that the benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. Then by sub-s. (j) of that section the lessee is conferred a right to transfer absolutely the whole or any part of his interest in the property, and any transferee of such interest may again transfer it. However, it is provided that the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. The law thus having been codified as to what a lease is, who is the lessor and who is the lessee, the rights of the lessee to enjoy the benefit arising out of the contract, the right of the lessee to transfer his interest absolutely to another in the property leased, the right of such assignee and the liabilities of the lessee, it will not be permissible, to my mind, to determine the relationship between the plaintiff and the second defendant, Kunj Behari Lal, on the basis of para. 640 in Foa's General Law of Landlord and Tenant, quoted above. It would be noted that nowhere in the Scheme of Chap. V of the Transfer of Property Act a transferee or an assignee of the absolute interest of the lessee in the pro-

perty leased has been described as a lessee or tenant. I do not think a transferee from a lessee can be said to be a lessee or tenant of the original lessor since s. 105 of the Act confines the relationship of lessor and lessee to the parties to the contract by which the right of enjoyment of the immovable property is transferred for a certain time express or implied, or in perpetuity, in consideration of a price paid. The emphasis, as I think, in the Scheme of Chap. V is on the contractual relationship. There being no privity of contract between the original lessor and the transferee from the lessee, the transferee will not become the lessee or tenant of the original lessor, though such transferee of the term will be able to enjoy the benefit of the leased property because of the statutory provision under sub-s. (c) of s 108 of the Transfer of Property Act.

Thus, the Indian Law as codified under the Transfer of Property Act does not appear to have recognised the English Law as summarised by Foa that a relationship of landlord and tenant can also be created between the original lessor and a third party by a lessee by assigning his term in favour of such third party. Indeed the English Law as summarised in Halsbury's Third Edition does not go to the extent as summarised by Foa in para. 640. The relevant paragraphs in Vol. 23 of Halsbury's Third Edition, which are in my opinion paras. 367, 369 and 371, referred to by Sri K. C. Saxena, learned counsel for the plaintiff-respondent, do not anywhere lay down that an assignee of the term becomes a tenant of the original lessor. The learned Judges of the Calcutta High Court in the case of *Krishna Dass Nandi v. Bidhan Chandra Roy* (1), as I find from the reported judgment, have not quoted any authority Indian or English in holding that a trans-

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(1) A.I.R. 1959 Cal. 181.

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feree becomes a tenant of the original lessor, but if that were the meaning to be given to their observation, then with great respect to them I do not find myself in agreement with their view. Certain decisions were cited at the bar before me which tend to show that the doctrine of privity of estate has been recognised by the courts in India, even by our Supreme Court, and Sri *Saxena* appearing of the respondent, has not disputed it but as discussed above the applicability of that doctrine does not help the defendant-appellant for claiming a direct relationship with the plaintiff-respondent by substituting himself in the place of Ratan Lal in the original deed of lease, dated 30th October, 1937. As assignee from Ratan Lal the defendant-appellant Kunj Behari Lal will certainly be entitled to the benefit of the contract between Ratan Lal and the plaintiff so long as the term of the lease lasted, being entitled to it under sub-s. (c) of s. 108 of the Transfer of Property Act, but that does not mean that he enjoys that benefit because he becomes a tenant of the plaintiff. He may enjoy such a benefit on the principle of privity of estate vesting in him which, appears to be the underlying basis of sub-s. (c) of s. 108 of the Transfer of Property Act. It may further be noted here that the lessor is not absolved of his liabilities merely by assigning his term to a third person. He continues to be bound by the terms of the lease. Again, this provision in the Transfer of Property Act in cl (j) of s. 108 may be rooted on the old English doctrine of contractual obligation or the privity of contract but the law as codified in the Transfer of Property Act keeps alive the distinction between a lessee, who is a tenant, and his assignee. There is nothing in the Scheme of the Transfer of Property Act which merges the personality of an assignee of a lessee into that of the lessee so as to vest in him the privity of contract also.

Unless there were a privity of contract between the original lessor and the assignee of the lessee, I do not think, under s. 105 of the Transfer of Property Act, an assignee can claim himself to be lessee of the original lessor or the tenant of the original lessor or the original landlord.

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In the case of *Pandit Kishan Lal v. Ganpat Ram Khosla* (1) an observation made in para. 7 at page 1556 was pressed into service by Sri S. P. Gupta in support of his contention that the assignee from the lessee is a tenant. I may quote the observation relied upon: "The true position was, therefore, that the Company did not immediately on the service of the notice cease to be a tenant, and Khosla, because he was let into possession became an assignee of the rights of the Company *as a tenant* and he could not be regarded as a trespasser" (*italicised* is mine). Sri S. P. Gupta wanted me to read that the words "as a tenant" apply to Khosla, who was an assignee from the tenant. It appears to me an impossible construction. The words "as a tenant" apply in the context to the Company which was the assignor. The learned Judges of the Supreme Court were emphasising the fact that the Company as a tenant put Khosla, the assignee, into possession and, therefore, Khosla was not a trespasser as he was put into possession by the tenant. There is nothing in the case of *Pandit Kishan Lal v. Ganpat Ram Khosla* (1), which is declaratory of the law by the Supreme Court, that an assignee of the term from the lessee becomes a tenant of the original lessor. What that case declares is that Khosla as an assignee, from the tenant, having been put in possession by the tenant, was not a trespasser but was amenable to the jurisdiction of the Rent Controller in the same manner as the Singer

(1) A.I.R. 1961 S.C. 1554.

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Sewing Machine Company, the tenant. The attempt of *Sri Gupta* on behalf of the defendant-appellant to establish that the appellant became a tenant in his own right on the basis of the doctrine of privity of estate fails

In this connection now I have to examine the argument of *Sri Gupta* grounded on the definition of "tenant" in the Rent Control Act. Cl. (g) of s. 2 of the said Act defines, "tenant" means "the person by whom rent is, or but for a contract, express or implied, would be payable for any accommodation". The submission was that since the liability to pay the rent under the contract of lease is a covenant running with the land that liability will fasten itself to Kunj Behari Lal, the assignee of the term, and he would be the person by whom rent is payable for the accommodation. I do not think it is possible to give an extended meaning to the definition of the "tenant" in the Rent Control Act as that to my mind, would frustrate the very purpose of the Act itself. That would permit a lessee or tenant who for all practical purposes under the Scheme of the Act is the allottee, to assign his tenancy to a third person and that third person in his turn may assign it to a fourth person and so on, each of them becoming tenant one after the other and retain possession of the accommodation without securing any allotment order under the Rent Control Act. That would frustrate the very Scheme of the Act. It is of no avail, as suggested by *Sri Gupta*, that such persons could be prosecuted for breach of the provisions of the Rent Control Act but the legal right to remain in occupation as tenant could not be defeated. I think the definition, under the Rent Control Act, of "tenant" is based on the doctrine of privity of contract and not on the doctrine of privity of estate. To extend the definition to persons

who enjoy the benefit of a contract of lease as assignees simply because they are liable to pay rent will amount to ignoring the very basis of that definition which emphasises the contractual relationship. The very definition mentions of a contract express or implied as an exception to the liability for payment of rent. That is indicative that the payability of rent under the definition arises out of a contract and not on some doctrine in equity such as doctrine of privity of estate.

Having held above that Kunj Behari Lal, the second defendant, neither became a tenant of the plaintiff under the Transfer of Property Act nor for the purpose of the Rent Control Act, the attack on the decree of the court below based on the lack of any notice terminating his tenancy and demanding the arrears of rent from him fails.

The next question then arises whether Kunj Behari Lal could be said to be a sub-tenant. On a plain reading of the deed, dated 2nd September, 1952, which is an absolute transfer of the right to enjoy the premises demised, it cannot be said that any relationship of landlord and tenant as such arose between Ratan Lal and Kunj Behari Lal. There may be some tenability in the contention of Sri *S. P. Gupta*, for the appellant, that no sub-lease was intended to be created but that alone does not solve the problem. There is equal tenability in the argument of Sri *K. C. Saxena*, learned counsel for the plaintiff-respondent that for the purposes of Rent Control Act the transaction evidenced by the deed, dated 2nd September, 1952 would amount to subletting by Ratan Lal to Kunj Behari Lal within the meaning of the Rent Control Act. Further Sri *K. C. Saxena* submitted that when subletting is prohibited without the permission of the District Magistrate or

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without the consent of the landlord under the Rent Control Act and assuming it confers a lesser interest, then *a priori* it follows that a transfer by the tenant of a larger interest is also ruled out under the Scheme of the Rent Control Act, therefore, an absolute assignment of the tenancy to a third person by the tenant will not be tolerated. It is unfortunate that under our Rent Control Act the prohibition clause is under sub-s. (3) of s. 7 which in so many words refers to subletting unlike the provisions of similar Acts in some other States which expressly prohibit assignments of the tenancy but I do not think I am doing any violence to the provisions of sub-s (3) of s 7 of the Rent Control Act, if I were to construe the word "sublet" as simply meaning letting in by a subordinate, that is to say by the lessee who is subordinate to the lessor, bringing in at his own initiative without the previous permission in writing of the District Magistrate or of the landlord, a third person into the accommodation and delivering to him the possession The word "let" has not been defined under the Rent Control Act but an idea as to its meaning can be gathered from sub-s (2) of s. 7 of the Act which empowers a District Magistrate by general or special order to require a landlord to let or not to let to any person any accommodation which is, or has fallen vacant, or is about to fall vacant When the District Magistrate requires a landlord to let an accommodation to any person it will mean that the landlord will be under a duty to put that person in possession for the purpose of enjoying the property as a tenant on payment of rent In that context when it is said that a tenant will not sublet under sub-s. (3) of s. 7 it only means that letting by a person who has been let into the accommodation under sub-s. (2) of s. 7 is not permitted. I have no difficulty in holding that when an assignee of a term is put in possession by the lessee of

the accommodation to enjoy it on the same terms and conditions as of the original lease, then for the purposes of the Rent Control Act what the tenant has done will amount to subletting the accommodation. The words "sublet the whole accommodation" used in cl. (e) of s. 3 of the Rent Control Act also clearly indicate that when the tenant parts with the possession of the whole of the accommodation let out and puts a third person in possession then he is liable to be evicted by the landlord.

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However, an ingenious argument was advanced by Sri S. P. Gupta to the effect that an absolute assignment of the term being permitted under cl. (j) of s. 108 of the Transfer of Property Act, such a provision will be deemed to constitute a term of the contract of lease hence the assignment even if it amounted to subletting, being permitted by the terms of the lease it could not be said within the meaning of cl. (e) of s. 3 of the Rent Control Act that the subletting was without the permission of the landlord. It is to be noted that cl. (j) of s. 108 of the Transfer of Property Act confers a right on the lessee to make a sub-lease also. If for the purposes of the application of the Rent Control Act the provisions of cl. (j) of s. 108 were to be read as amounting to a permission by the landlord to sublet then the sub-cl. (e) of s. 3 of the Rent Control Act will be rendered nugatory as every tenant then could claim that a general permission to sublet existed. I am not prepared to accept an argument which leads to such a result. If this argument were to be accepted then even in case of monthly tenancy of an accommodation when the District Magistrate has allotted the accommodation the landlord when letting in the allottee must always in writing prohibit subletting that is enter into a contract to the contrary. What is contemplated by

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sub-s. (e) of s. 3 is that if the tenant wants to secure protection from eviction even though the general law may have conferred on him a right of subletting, he must obtain permission of the landlord to sublet. Moreover, the provisions of Rent Control Act in the field where they operate will render the general provisions of the Transfer of Property Act inapplicable. When there is a clear provision under the Rent Control Act that for subletting the whole or part of the accommodation there must be a permission of the landlord, benefit cannot be taken by an erring tenant of the provisions of cl. (j) of s. 108 of the Transfer of Property Act.

What I have discussed above leads to the result that in assigning the tenancy rights by the deed, dated 2nd September, 1952, in so far as the provisions of the Rent Control Act were concerned, Ratan Lal sublet the accommodation in suit to Kunj Behari Lal. There being no evidence on record that the permission of the plaintiff was obtained or that the plaintiff in any way recognised Kunj Behari Lal as the occupant so as to operate as an estoppel against him, the evidence on the other hand being that the plaintiff never accepted rent from Kunj Behari Lal, the view taken by the court below that Ratan Lal as the tenant was guilty of subletting within the meaning of cl. (e) of s. 3 of the Rent Control Act cannot be said to be legally erroneous.

It is not disputed and it could not be disputed by Sri Gupta, for the defendant-appellant, that despite the assigning of the term Ratan Lal remained under a liability to pay rent but he made a contradictory argument when he said that Ratan Lal ceased to be a tenant. The contradiction is obvious on his own argument. The definition clause under the Rent Control Act would draw in within its perview Ratan Lal also as he was liable to pay rent, which liability is not disputed. That

creates another difficulty for me to accept, for the purpose of the Rent Control Act that Kunj Behari Lal was a tenant of plaintiff as I find it impossible to concede to the position that there would be simultaneously two different tenants of the same accommodation liable to pay rent not as cotenants or joint tenants or tenants in common but under a doctrine of equity developed by English courts which doctrine, as I have said above, will have no application for applying the statutory law under the Rent Control Act or under the Transfer or Property Act. For the purpose of Rent Control Act, therefore, Ratan Lal would be the tenant, no matter for the time being the actual occupant was Kunj Behari Lal who was enjoying the benefit of the contract. As already discussed above, both under the Transfer of Property Act and under the Rent Control Act it is the privity of contract which is the basis of the codified law and not the privity of estate as developed by the English courts.

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It is not necessary for me to consider the correctness of the finding recorded by the court of first instance on the question of material alterations made in the accommodation, as what I have found above will be conclusive of the appeal. Ratan Lal, the tenant, not having paid the arrears of rent despite a notice of demand having been served upon him, he ceased to be protected by s. 3 of the U. P. (Temporary) Control of Rent and Eviction Act and the plaintiff as landlord was entitled to evict him by terminating his tenancy and the second defendant will go along with him.

It is also not necessary for me to consider a fine question raised by Sri K. C. Saxena, for the defendant-respondent, as to the rights of Kunj Behari Lal after the expiry of the original term of the lease on 31st October,

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1957, though there appears to be some plausibility in the argument that even assuming Kunj Behari Lal had rights as an assignee on the basis of the doctrine of privity of estate, that would come to an end after the lapse of 20 years from the date of the original lease in favour of Ratan Lal as that was the term of the lease and he was only assignee of the term.

I, however, find force in the submission of Sri *Gupta*, on behalf of the defendant-appellant, that the court below erred in not permitting the defendant appellant, Kunj Behari Lal, to remove the superstructure of the constructions raised or acquired by him on the land in dispute. In any case, I find from the decree that it is not clear. I must make it clear that Kunj Behari Lal, the defendant-appellant, has a right to remove the super structure belonging to him on the land in dispute and the decree requires modification to that extent only. It was, however, urged that there has been some agreement between the plaintiff and the first defendant about the removal of superstructures. How far that agreement will effect the rights of the second defendant or what is their value may be questions to be decided by the execution court. I do not see how the rights of second defendant, who was also occupying the land as an assignee and not as a trespasser, to remove the superstructures raised or acquired by him can be defeated.

For the reasons given above, while dismissing the appeal and confirming the decree of the court below, I direct that in the decree after the words "defendant no. 1" the words "and defendant no. 2 be also added. The plaintiff-respondent would be entitled to the costs of this appeal.

Appeal dismissed.

CIVIL MISCELLANEOUS

Before Mr. Justice R. S. Pathak and

Mr. Justice H. Swarup

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March, 18.

STATE OF U. P. AND ANOTHER OPPOSITE-PARTIES.

U. P. Control of Goondas Act, 1970, ss. 4(1) and 3(3) and Constitution of India, Art 19

The provisions of s. 3(3) of the Act are not unconstitutional *ultra vires* or void.

The powers contained in s. 3(3) can, if exercised, effect the fundamental rights of a person guaranteed under cls. (d) (e) and (f) of Art. 19 of the Constitution. The entire section is a composite section and the various sub-sections and clauses have to be interpreted and construed in the light of what is contained in sub-s (1) of s. 3. The interpretation of sub-s (3) will also have to be made keeping in view the purpose of the enactment and object to be achieved by the order. The heading of the enactment, viz. "The Uttar Pradesh Control of Goondas Act" shows that the purpose of the Act is to control the nefarious activities of unsocial elements. The preamble of the Act and the definition of the term 'Goondas' also shows that a Goonda is a person who carries on activities which are against the people and which, if permitted, are likely to endanger the interest of the general public. Sub-s. (1) of s. 3 also points to the same conclusions. The power given by s. 3(3) to the District Magistrate contains a law made in the interest of the general public as contemplated by cl. (5) of Art 19 of the Constitution.

Civil Miscellaneous Writ Petition no. 162 of 1972.

K. P. Singh and R. N. Singh, for the Applicant.

K. C. Agarwal, for the Opposite-parties.

H. SWARUP. J :—A notice under s. 3(1) of the U. P. Control of Goondas Act, 1970 (hereinafter referred to as the Act) was issued by the District Magistrate, Vara-

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nasi to the petitioner Raja for taking action against him under sub-s. (3) of s. 3 of the Act.

The petitioner has challenged the notice, *inter alia*, on the ground that the provisions of s. 3 (3) of the Act are unconstitutional, *ultra vires* and void. He has also challenged the notice on merits. The proceedings initiated by the notice are still pending before the District Magistrate and no final order has yet been passed.

S. 2(b) of the Act gives the definition of a Goonda. According to s. 2(b) :

“ ‘Goonda’ means a person who :—

(i) either by himself or as a member or leader of a gang, habitually commits, or attempts to commit, or abets the commission of, offences punishable under Ch. XVI, Ch. XVII or Ch. XXII of the Indian Penal Code, 1898 (Act V of 1898); or

(ii) has been convicted under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice under the U. P. Excise Act, 1910 ; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community.”

S. 3(1) provides the conditions under which action may be taken against a Goonda. According to this section the District Magistrate is authorised to issue a notice in writing to the person concerned in case it appears to him that the conditions laid down in cls. (a), (b) and (c) thereof are satisfied. These conditions are as follows :

“(a) That any person is a goonda ; and (b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property ; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of any offence punishable under Chap. XVI, Chap XVII or Chap XXII of the Indian Penal Code, or under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or under the U. P. Excise Act, 1910, or in the abetment of any such offence ; and

, (c) That witness are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property ”

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The notice is required to convey information to the person concerned of the material allegations against him. The District Magistrate is also required to give to the person concerned a reasonable opportunity of tendering an explanation regarding these allegations. Under sub-s (2) of s 3 the person is given a right to consult and be defended by a counsel of his choice and a reasonable opportunity of examining himself and any other witness that he may wish to produce in support of his explanation Sub s. (3) provides that after the afore-said procedure has been gone through and the District Magistrate is satisfied that the conditions specified in cls (a)(b) and (c) of sub-s (1) exist he may be ordered in writing—

“(a) direct him to remove himself outside the district, or part, as the case may be, by such route, if any, and within such time as may be specified in the order, and to desist from entering the district or the specified part thereof until the expiry of such period not exceeding six months as may be specified in the order ;

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(b) (i) require such person to notify his movements, or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order ;

(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order, until the expiration of such period, not exceeding six months as may be specified in the order."

S. 4 provides for permission to return temporarily to the place from where the person is externed. S. 5 provides for extension of the period provided by the original order and in s. 6 an appeal is provided against the order within fifteen days from the date of the order. The Commissioner is given the power on appeal either to confirm the order with or without modification or to set it aside. He also can pass interim stay orders. S. 8 provides the nature of evidence to be considered by the District Magistrate or the Commissioner.

Before the enactment of the Act there was in force the U P Control of Goondas Ordinance, 1970 and thereunder certain rules were framed which were known as U P Control of Goondas Rules, 1970 (hereinafter referred to as the Rules) S. 16 of the Act repeals the Ordinance

The chief contention of learned counsel for the petitioner is that sub-s. (3) of s. 3 gives the District Magistrate such unlimited powers which, if exercised, will contravene the fundamental rights guaranteed to the petitioner under cls. (d), (e), (f) and (g) of Art. 19 of the Constitution. The petitioner's case is that the powers are not saved by cl. (5) of Art. 19 (2) of the Constitution as the restrictions imposed on the funda-

mental rights of the petitioner are not reasonable. There is no dispute that the powers contained in s. 3(3) can if exercised effect the fundamental rights of the person guaranteed under the cls. (d), (e) and (f) of Art. 19 of the Constitution. Cl. (g) of Art. 19 is hardly applicable as none of the clauses gives the power to the District Magistrate to pass any order concerning the carrying on of a business or profession by the person concerned.

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But for the true construction of the Act it is not possible to read cls. (a) and (b) of s. 3(3) of the Act bereft of the context in which they have been enacted. The entire section is a composite section and the various sub-sections and clauses have to be interpreted and construed in the light of what is contained in sub-s. (1) of s. 3. The interpretation of sub-s. (3) will also have to be made keeping in view the purpose of the enactment and the object sought to be achieved by the order. The heading of the enactment, viz. "The Uttar Pradesh Control of Goondas Act" shows that the purpose of the Act is to control the nefarious activities of the unsocial elements. The preamble of the Act is—

"An Act to make special provisions for the control and suppression of Goondas with a view to the maintenance of public order."

The definition of the term 'Goonda' also shows that a Goonda is a person who carries on activities which are against the people and which if permitted are likely to endanger the interests of the general public. Sub-s. (1) of s. 3 also points to the same conclusion. We have, therefore, no doubt that the power given by s. 3(3) to the District Magistrate contains a law made in the interest of the general public as contemplated by cl. (5) of Art. 19 of the Constitution.

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Cls. (d) and (e) of Art. 19(1) of the Constitution guarantee to every citizen the freedom to move freely throughout the territory of India and reside and settle in any part of the territory of India. Cl (f) of Art. 19(1) guarantees the right to acquire, hold and dispose of property. For the purpose of testing whether the restrictions imposed by the statute are reasonable or not when the restriction is in respect of cls (d) and (e) of Art 19(1), two factors are relevant, viz. the territorial extent and the duration of externment. The area from which the person can be directed to be externed under sub-s. 3 of s 3 of the Act is limited to a district or a part thereof. It cannot be regarded as such a wide area the externment from which might by itself be unreasonable. We also see no force in the contention that the removal of a person from the area where he has a home or carries on business is necessarily unreasonable. No doubt, it will adversely affect his convenience, comforts and, may be, opportunity of making a living, but these circumstances by themselves cannot make the law bad if the same is necessary in the interest of the general public. The reasonableness of restriction will also depend upon the purpose for which the restriction is imposed. The purpose in the present case being to keep the bad character away from the area where he operates, his removal from that area cannot be unreasonable.

In the case of "*Narendra Kumar v. Union of India* (1)" it was held that "a restriction can under Art. 19 include a case of prohibition also and an order of externment from a particular area could be valid if the restriction was reasonable". It was also observed there that—

"In applying the test of reasonableness, the Court has to consider the question in the background

(1) A.I.R. 1960 S.C. 480.

of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, and the ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

Applying the test in the present case, where the purpose is to prevent commission of crime and to make it possible for witnesses to give evidence against bullies, the restrictions imposed by s 3(3) cannot be held to be unreasonable.

Learned counsel for the petitioner relied on the case of "*State of Madhya Pradesh v Bharat Singh* (1)" and contended that the law which directs externment of a person from the district of his residence is *per se* unreasonable. No such law was laid down in that case. That case arose out of an order passed under the Madhya Pradesh Public Security Act. Cl (a) of s 3(1) of that Act provided for the externment of a person and cl. (b) provided that such a person may be required to remain in such area as may be specified in the order. Cl. (b) came up for consideration before the Supreme Court and it was held that an order directing a person to reside at a particular place was not reasonable. Cl (a) did not come up for consideration before the Supreme Court, but the Madhya Pradesh High Court had held it to be valid. This case, therefore, is no authority for holding that a pure order for externment from a particular area is *per se* unreasonable.

Learned counsel then contended that sub-cl (iii) of cl. (b) of s 3(3), authorising the District Magistrate to direct the person to conduct himself in such manner as

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may be specified in the order, could be used to direct him to stay in a particular place. We are unable to accept this contention, as in our opinion under sub-cl. (iii) no such order can be passed. Cls (a) and (b) are not meant to be exercised simultaneously. Once an order is passed under cl (a), the question of passing an order under cl. (b) does not arise, because once a person is extenuated out of the area where he operates and creates alarm danger or threat to persons and property of persons living in that area or where he is likely to commit a crime, the purpose is achieved when he is extenuated from that area, and the question of placing any further restrictions on his movements or possessing objectionable articles does not arise. There is a more serious reason for the view of that the District Magistrate cannot pass simultaneously orders under cls. (a) and (b), and it is that the District Magistrate cannot exercise jurisdiction beyond the territorial limits of the district. He cannot pass an order affecting a person or his property outside his district. Hence, once a person is extenuated out of the district there is no question of imposing any other restriction on him as contemplated by cl (b). It is only when a person is permitted to remain within the area in which he operates that restrictions are required to be placed and it is then alone that cl (b) can come into play. In case of "*State of M. P. v. Bharat Singh*" (1) it was observed that appropriate orders can be passed under cls. (c) and (d) of s. 3(1) of the M. P. Public Security Act to restrict movements of a person and maintain possession over him. Sub-cl. (iii) of cl. (b) of s 3 of the Act authorises the District Magistrate "otherwise to conduct himself in such manner as may be specified in the order". The word 'otherwise' must mean a conduct different from the one contemplated in the other two sub-clauses of cl. (b). It

(2) A I R. 1967 S C S C. 1170.

cannot include in its domain the power to direct a person to live in a particular place outside the district or within the district. This contention of learned counsel is therefore untenable and has to be rejected.

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Coming to the next criterion for determining whether the restrictions are reasonable or not, viz. the duration of the restrictions, we find that the maximum duration permissible in the Act is six months. Learned counsel for the petitioner contends that the duration of six months is unreasonable while it is contended by learned Advocate-General that the restriction of six months is not of a period so long as to make it unreasonable within the meaning of cl. (5) of Art 19 of the Constitution. The Supreme Court, in "*Gurbachan Singh v. State of Bombay*", (1) upheld the validity of s 27(i) of the City Bombay Police Act and observed:

"There can be no doubt that the provision of s. 27(i) of the Bombay Act was made in the interest of the general public and to protect them against dangerous and bad characters whose presence in a particular locality may jeopardize the peace and safety of the citizens. The maximum duration of the externment order made under s. 27(1) of the Bombay Act is a period of two years and the Commissioner of Police can always permit the externnee to enter the prohibited area even before the expiration of that period. Having regard to the class of cases to which this sub-section applies and the menace which an externment order passed under it is intended to avert, it is difficult to say that this provisions is unreasonable."

S. 4 of the present Act gives the power to the District Magistrate to permit any person in respect of whom an

(1) AIR 1962 S C. 221

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order has been made under cl. (a) of s. 3(2) to return for a temporary period into the area from which he was directed to remove himself. S. 9 further gives the District Magistrate and the Commissioner the power to rescind at any time an order made under s. 3, whether or not such order was confirmed on appeal under s. 6. In view of these provisions and looking at the purpose of the enactment, the period of six months cannot be held to be unreasonable within the meaning of cl. (5) of Art. 19.

Learned counsel has attacked sub cls. (ii) and (iii) of cl. (b) of s. 3(3) on the ground that they give unguided and unreasonably wide powers to the District Magistrate. We do not find any force in this contention. Sub-s (3) is an integral part of s. 3 and must be read along with the earlier provisions of the section. The power to be exercised under sub-s (3) is only to remedy the evil contemplated by sub-s (1). The powers given to the District Magistrate under sub-cl. (ii) and (iii) of s. 3(3)(b) cannot, therefore, be held to be unchannelised or undefined or without any guidance restrictions. These provisions cannot be interpreted to mean that the Act has conferred on the District Magistrate to do whatever he likes irrespective of the purpose for which the power has been conferred on him. It was pointed out by the Supreme Court in "*Harishanker Bagla v. M P. State*" (1) that—

"The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such

(1) A.I.R. 1954 S.C. 465.

a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the Courts to undo the mischief."

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Similarly, "*In re Kerala Education Bill*" (1) the Supreme Court observed—

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"Reference has already been made to the long title and the preamble of the Bill. That the policy and purpose of a given measure may be deduced from the long title and the preamble thereof has been recognised in many decisions of this court. The general "policy of the Bill as laid down in its title and elaborated in the preamble is ... Each and every one of the clauses in the Bill has to be interpreted and read in the light of this policy. When, therefore, any particular clause leaves any discretion to the Government to take any action it must be understood that such discretion is to be exercised for the purpose of advancing and in aid of implementing and not impeding this policy. It is, therefore, not correct to say that no policy or principle has at all been laid down by the Bill to guide the exercise of the discretion left to the Government by the clauses of this Bill."

We have already referred to the preamble and object of the Act and its long title and other provisions which show the purpose and policy behind the Act and it cannot be urged that the power given to the District Magistrate is an unguided power.

Learned counsel then contended that s. 3 of the Act is void as it provides no procedure for enabling the accused person to defend himself. The contention is that as the District Magistrate is not required to disclose the evidence on which he intends to take action and to pro-

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duce witnesses for cross-examination by the accused, the opportunity of explanation and the procedure laid down in sub-ss. (1) and (2) of s. 3 is only illusory. Here too we are not prepared to accept the contention. Sub-s. (1) of s. 3 requires that the District Magistrate shall by notice in writing inform the person concerned of the general nature of the material allegations against him in respect of cls. (a), (b) and (c) and give him a reasonable opportunity of tendering explanation regarding them. When the law requires a District Magistrate to inform the accused of the general nature of the material allegations, it means that the material supplied must be of objective nature and must be such to explain and disprove which the accused may give explanation and furnish evidence. Sub-s. (2) of s. 3 not only gives the person an opportunity to defend himself but a right to consult and be defended by a counsel of his choice, and also an opportunity of examining himself and of examining any other witness that he may wish to produce. The order finally passed is subject to an appeal to the Commissioner. The procedure laid down in the Act cannot, therefore, be held to be illusory. The procedure provided in the Act is almost similar to that provided in the City of Bombay Police Act. In the case of *Gurbachan Singh v. State of Bombay* (1), the Supreme Court, when dealing with the procedure to be followed in cases under s. 27(1) of the Bombay Act, observed—

“The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing herein. This object would be wholly defeated if a right to confront or cross-exa-

(1) A.I.R. 1962 S.C. 221.

mine these witnesses was given to the suspect. The power to initiate proceedings under the Act has been vested in a very high and responsible officer and he is expected to act with caution and impartially while discharging his duties under the Act "

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With these observations the contention that the Bombay Act provided no reasonable procedure was rejected by the Supreme Court. We are similarly unable to hold that s 3 of the Act does not provide a reasonable procedure

Learned counsel for the petitioner further contended that the section is void on the ground of Art. 14 of the Constitution as procedure provided in the Article is different from the one provided for action against suspects in s 110/117 of the Code of Criminal Procedure. We, however, find that the category of persons to be dealt with under s 110 and s 117, Cr P C is different from the category of persons to be dealt with under this Act. The purpose and the object sought to be achieved by the two enactments are also different. A similar contention was raised in the case of *Gurbachan Singh* (1) and it was rejected by the Supreme Court. The Supreme Court laid down—

"It is true that a procedure different from what is laid down under the ordinary law has been provided for a particular class of persons against whom proceedings could be taken under s. 27(1) of the City of Bombay Police Act. But the discrimination, if any, is based upon a reasonable classification which is within the competency of the Legislature to make. Having regard to the objective which the legislation has in view and policy underlying it, a departure from the ordinary procedure can certainly be justified as the best means of giving effect to the object of the Legislature." (para 8).

(1) A.I.R. 1962 S.C. 221

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In our opinion, on the same reasoning the provisions of s. 3 of the Act are not hit by Art 14 of the Constitution.

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The last contention of learned counsel challenging the validity of the various provisions of the Act is that s. 8 read with r 23 gives to the District Magistrate power to take into consideration material which could not reasonably be treated as good material for passing orders. S 8 states that the District Magistrate or the Commissioner may for the purpose of satisfying himself as to whether the conditions necessary for the making or confirmation of an order under s. 3 or s. 5 exist or not, take into consideration any evidence which he considers to have probative value, and the provisions of the Indian Evidence Act, 1972, have been made inapplicable. R 23 states that :—

“For the purposes of s. 8 the following circumstances may also be taken to have probative value:

(i) that the person concerned was acquitted of any offence punishable under all or any of the provisions mentioned in cl. (b) of s.2 merely on technical grounds or on benefit of doubt being given to him ;

(ii) that the person concerned has previously been bound down under s 107, s. 108, s. 109 or s. 110 of the Code.”

Learned counsel for the petitioner attacked the first part of this rule on the ground that it gives a discretion to the District Magistrate to treat even the circumstance where a person is acquitted of an offence as of probative value. However, on a true construction of this Rule, read with s. 8 of the Act, we think that what the Rule means is that it is open to the District Magistrate to take into consideration the circumstance that a per-

son was prosecuted though conviction could not be secured against him for technical reasons or that the evidence fell short of proving beyond reasonable doubt that the person had committed the crime. As the entire Act is of a preventive nature and its purpose is to remove any hinderance to fair trial when it becomes impossible due to witnesses not coming forward to depose against the person concerned, the circumstance of a person getting acquitted for technical reason or lack of sufficient evidence cannot be held to be irrelevant. Moreover, the Rule only gives a discretion, but the final determination is to be made by the District Magistrate himself to see if the circumstance is of probative value or not. While considering a similar matter, the Supreme Court in "*Hari v Dy. Commissioner of Police*" (1) observed:—

"It cannot be laid down as a general proposition of law that a previous order of discharge or acquittal cannot be taken into account by those authorities when dealing with persons under any one of the provisions we have been examining in this case."

We cannot, therefore hold that the procedure laid down in the Act is bad because s. 8 or r. 23 provides that the circumstance of acquittal in certain cases is of probative value.

The last contention of learned counsel for the petitioner is that the notice issued by the District Magistrate is bad on merits as the material allegations mentioned in the notice are not such on the basis of which the District Magistrate can come to any conclusion that the conditions of cls (a), (b) and (c) of sub-s. (1) of s. 3 of the Act had been satisfied. We do not think it appropriate to enter into the merits of the matter at this

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(1) A.I.R. 1956 S.C. 559.

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stage. The matter is being examined by the District Magistrate. It would be open to the petitioner to show to him that on merits no case is made out against him. If the order is passed against the petitioner it would be subject to an appeal to the Commissioner. We therefore, do not think it appropriate to consider the matter on merits in these proceedings.

In the result, the petition fails and is dismissed with costs.

Petition Dismissed.

CRIMINAL MISCELLANEOUS

*Before Mr. Justice K.C. Puri and Mr Justice K.B. Srivastava**

RAM LAL PODDAR

PETITIONER,

vs.

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 March, 16.

TAHSILDAR NANPARA

RESPONDENT

Constitution of India. Art. 226—Habeas Corpus—Maintainability of.

An application for *Habeas Corpus* is competent even when a person is released on bail.

Sandal Singh v. District Magistrate, Dehra Dun (1) *Mohd. Zahurul Haq v. State* (2) followed.

Land Improvement Loans Act, 1883, s. 7 and U. P. Taqavi Rules and U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 279—Taqavi Loan—Recovery of—Process for.

There is a distinction between arrears of land revenue and sum recoverable as arrears of land revenue but once a statute says that a particular loan can be recovered as if it was an arrear of land revenue s. 279 of U. P. Zamindari Abolition and Land Reforms Act will have full application.

Held, the transaction in question was a Taqavi loan and the respondent had the right to issue a citation or to attach the movables or to arrest the petitioner or to do all those things simultaneously or one after the other.

*While sitting at Lucknow.

(1) A.I.R. 1984 All. 148.

(2) 51 Cr. L. J. 781.

Criminal Writ Petition no 164 of 1969 under Art. 226 of the Constitution of India

B. M. N. Kacher, Advocate for Petition

Dy. Government Advocate, for opposite-parties.

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K B SRIVASTAVA J. .—This is a petition under Art 226 of the Constitution of India for the issue of a writ of *habeas corpus* and of *certiorari* quashing certain documents and processes. The petition arises out of the following facts :

The petitioner Ram Lal Poddar alleges that he made an application in the year 1949 for supply of some materials on credit for the construction of a masonry well for purposes of irrigation, and on the basis of that application the Agriculture Department supplied some materials in instalments but not all the materials indented by him. The Agriculture Department assessed the price of the material supplied at Rs 420 80. He received a citation in the year 1963 for the payment of the assessed price. Subsequently, his movables of the value of Rs.1,500 were attached and entrusted in the *supnudgr* of one Suraj Lal as custodian and the attached goods were not returned to him and nothing was heard about the recovery processes till the close of the year 1968. He was arrested on January 27, 1969 on a warrant of recovery for the realization of Rs.420 80 as the price and Rs.41 as the decretal amount. He then made an application (Annexure I), supported by an affidavit (Annexure II) and he was then released on bail on furnishing a personal bond and a surety bond for Rs.461.80. His grievance is that he was put in double jeopardy inasmuch as his movables worth Rs. 1,500 were attached and still he was arrested under s. 281 of the U. P. Zamindari Abolition and Land Reforms Act and R. 247 of the U. P. Zamindari Abolition and Land Reforms Rules. His contention is that he had purchased

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goods on credit and the price did not amount to arrears of land revenue and, therefore, the coercive processes prescribed for the recovery of arrears of land revenue had no application in his case. His further contention is that the unpaid purchase money could not be regarded as "financial assistance" under the Public Moneys (Recovery of Dues) Act, 1965 and, therefore, that Act also has no application. It is in these circumstances that he has prayed for a writ of *habeas corpus* so that the restraint put on his liberty by the personal and surety bonds is terminated and for a writ of *certiorari*, quashing the said bonds, the citation, and ancillary recovery processes.

The petition has been resisted by the respondent, namely, Tahsildar, Nanpara by a counter-affidavit, dated February 21, 1969, a supplementary counter-affidavit, dated February 25, 1969 and a second supplementary counter-affidavit, dated December 23, 1971, the first having had been filed by the Tahsildar and the latter two by Anandji Srivastava, office assistant in the office of the Agricultural Engineer, Kanpur. We will revert to the facts later in the judgment, for at the present moment, we will like to dispose of two preliminary points of law.

The first point is whether or not a writ of *habeas corpus* can lie after a person is detained and then released on bail and regains his liberty. This point is concluded by *Sandal Singh v. District Magistrate and Superintendent, Dehra Dun* (1), a Division Bench decision of this Court wherein SULEMAN, C. J. speaking for the Court observed thus—

"The mere fact that after his arrest he was temporarily released on bail pending further enquiry does not oust the jurisdiction of the High Court under this section."

(1) A.I.R. 1934 All. 148.

SULEMAN, C. J. was referring to s. 491 of the Code of Criminal Procedure. It was held in 1945 Indore Law Reports, 143 that even if a person is temporarily released on bail prior to his being extradited, he must be considered to be detained in the constructive custody of the Court through the surety, as his liberty is subject to restraint and he has to be produced before the Court by the surety whenever required. Reliance for this was placed on the reported decision of this Court. The same view was reiterated by the Madhya Bharat High Court in *Mohammad Zahurl Haque v State* (1). We are of view, therefore, that an application for *habeas corpus* is competent even when a person is released on bail.

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The next contention of the learned counsel for the petitioner is that even if the unpaid price amounts to "financial assistance" under the Public Moneys (Recovery of Dues) Act, 1965, it cannot be recovered under that Act because it has been declared *ultra vires*. This contention is well founded. See *P. P Industries v. District Magistrate* (2).

Now the contention of the learned counsel for the petitioner is that the amount of Rs. 41 which represents the decretal money can in no case amount to an arrear of land revenue. This point has been conceded and we need not, therefore, dilate any further upon it.

As regards the remaining amount of Rs. 420.80, his contention is that it represents either a loan in kind of materials supplied or unpaid price and in neither case can the amount be regarded as arrears of land revenue. On the other hand, this argument has been assailed by the learned Government Advocate who has urged that the amount represents a Taqavi loan and as such it can be recovered as arrears of land revenue.

(1) 51 Cr. L. J. 781.

(2) 1971 A.L.J. 1211 (F.B.)

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In order to resolve this controversy we have to look to the back-ground history as it appears from the affidavits. Annexure 1 (now marked Annexure C by the Court in order to avoid confusion in references to annexures) is G. O. No F-769/XII-A-207 49, dated September 27, 1949, from the Government to the Chief Agricultural Engineer, U P It shows that Government sanctioned a Five-Year Plan of sinking masonry wells from the years 1947-1948 to 1951-1952 in order to attain self-sufficiency in the matter of food by bringing additional acreage under cultivation and by intensifying production so as to increase the yield per acre It was emphasised that irrigation facilities played an important role in increasing production per acre and the scheme of sinking masonry wells offered considerable scope in this respect. Government, therefore, sanctioned the scheme for various districts including the District of Bahraich where the petitioner resides. A cultivator was made eligible to a subsidy at the rate of one-third of the cost of a masonry well subject to a maximum of Rs 500 per well provided that he possessed a holding of at least 5 acres and not more than 10 acres, his application stood sanctioned in advance, and he completed the construction of the well within a period of 12 months from the date of the sanction to the satisfaction of the Agriculture Department. The subsidy was to be paid after the Senior Mechanical Inspector or the Assistant Engineer had inspected the well and certified that it had been satisfactorily constructed. An application was to be accompanied by a certified extract from the Patwaris' record stating the size of the holding and the position of the well, if any, already existing on the holding. The Government order further stated that if an approved applicant desired to have construction materials such as iron and steel, cement, and coal for burning bricks, he may

be advanced these materials up to the value of the amount of subsidy admissible, that is one-third of the cost of the well. This advance was to be treated as an interest free Taqavi and the special Rules for Taqavi under Chap. VII of Taqavi Rules were to apply to such an advance. On a satisfactory completion of the well, the value of the advance was to be set off against the subsidy, otherwise it was to be recovered as a Taqavi loan. Departmental staff was instructed to ensure that the applicants utilized the materials only for the purpose for which they were issued. Annexure 2 (Annexure D) is the application of the petitioner, dated November 7, 1949, made after the issue of this Government Order. It is headed "Sahayak Yojna Ke Antargat Kunwen Banwane Ka Prarthna Patra." It was addressed to Agricultural Engineer through the Deputy Commissioner. It recites that he had an agricultural holding of an area of 9.700 acres in village Bhatehta but there was no existing irrigation facility. Therefore, he was making this application under "Sahayak Yojna" so that bricks, cement and iron was supplied to enable him to construct the well before November, 1950. It went on to mention that he was prepared to make a deposit in advance to cover the price of the materials, a promise which he never fulfilled. The Patwari gave a certificate about the extent of the petitioner's holding and non-existence of any well on that holding. The petitioner further undertook to use the materials only in the construction of the well and for no other purpose. He also furnished two sureties. A recommendation was then made by the District authorities. Annexure 3 (E) shows that cement, M.S. flat, bolts, nuts and coal of the total value of Rs 420-12-9 were supplied on April 19, 1950 and the bill was sent to him. It further shows that he acknowledged receipt on the same day. It is meaningless to urge that the materials were supplied

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in instalments or some materials were not supplied. It is true that the materials were supplied on credit. It is also true that the price of the materials was to be set off towards the subsidy of Rs.500. but that was dependent upon the further fact that the materials were used in the construction of the well and it was duly constructed within 12 months. The counter-affidavit shows that when an inspection was made by the Mechanical Inspector on April 11, 1954, it transpired that the petitioner had not constructed any well whatsoever. It is in these circumstances that he lost his claim to a subsidy and became liable to pay the loan as if it was a Taqavi loan. R. 1, U P Taqavi Rules, says that "Taqavi" means a loan advanced under the Land Improvement Loans Act, 1883. R. 3 says that a loan for construction of masonry wells is a loan under the said Act. S. 4 of the Act says that loan may be granted for the purpose of making any improvement. S. 4(2) of that Act says that 'improvement' means any work which adds to the letting value of land and includes the following, namely; (a) the construction of wells, for the storage, supply or distribution of water for the purposes of agriculture.

S. 7 of the Act says that all loans granted under the Act . . . shall, when they become due, be recoverable by the Collector from the borrower, as if they were arrears of land revenue due by him. Chap VII, Taqavi Rules, covers a loan of the kind in question. S. 279, U. P. Zamindari Abolition and Land Reforms Act says that any arrear of land revenue may be recovered by anyone or more of the following processes:

"(a) by serving a writ of demand or citation to appear on any defaulter,

(b) by arrest or detention of his person,

(c) by attachment and sale of his movable property including produce,

(d) to (g)”

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This section thus lays down the procedure for the recovery of arrears of land revenue. It enumerates as many as seven modes whereby an arrear of land revenue may be recovered from a defaulter. Several Modes may be taken in hand simultaneously or one after the other. Certainly, there is a distinction between arrears of land revenue and sums recoverable as arrears of land revenue but once a Statute says that a particular loan can be recovered as if it was an arrear of land revenue, s. 279, Uttar Pradesh Zamindari Abolition and Land Reforms Act will have full application. We are of the view, therefore, that the transaction in question was a Taqavi loan and the respondent had the right to issue a citation or to attach the movables, or to arrest the petitioner, or to do all these things simultaneously or one after the other. We are aware of the fact that some movables were attached and there is no accounting. The petitioner may seek his remedy as to that in a proper court of law, as and when advised. At present, it is clear to us that in spite of the subsisting attachment, if any, the respondent had the legal right to effect the arrest of the petitioner.

Altogether, therefore, no writ of *habeas corpus* can be issued and the citation or the bonds or the processes cannot be quashed. The writ petition is, therefore, dismissed with costs.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice S. Chandra and Mr. Justice T. S. Misra.

VISHWA MITRA CHADDHA

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March, 18.

AND OTHER

APPLICANTS

v.

SMT. AMRIT KAUR AND OTHERS OPPOSITE-PARTIES

Motor Vehicles Act, 1939, ss. 96, 110-B, 110-D and 110-F—Accident by a insured car—Deceaseds representative can claim compensation even against the insured person.

S. 96 primarily deals with the insurer. Its purpose is not to define or limit the liability of the insured person

S. 110-F bars the jurisdiction of civil courts, and all claims for compensation will come within the jurisdiction of Claims Tribunal. The phrase "any question relating to any claim for compensation" is so wide that it will obviously include the question of fact or law which Claims Tribunal can adjudicate against the insurer.

F. A. F. O. No. 256 of 1970 from the judgment and award, dated July 24, 1970 of B. O. Mathur, The Motor Accident Claims Tribunal, Lucknow.

Deoki Nandan, for the Applicant.

S. N. Verma and R. S. Saxena, for the Opposite-parties.

S. CHANDRA, J.:—This is an appeal under s. 110-D, Motor Vehicles Act, 1939. The appellant owned an Ambassador Car no. USF 3581. He was running it as a taxi between Kanpur and Lucknow, through a driver. On September 11, 1969, this car was taking several passengers including Autar Singh from Kanpur to Lucknow. On the way it met with an accident; as a result, Autar Singh along with the driver of the vehicle, died. The legal representatives of the deceased Autar Singh lodged a claim for recovery of Rs.1,00,000 as compensa-

tion against the appellant as the owner of the car and the Oriental Fire and General Insurance Company Limited, Kanpur, as the insurer of the vehicle. The Motor Accidents claims Tribunal decreed the claim for Rs.26,400 out of which Rs 4,000 were held payable by the insurance company. The appellant was made liable to pay the rest. Aggrieved, the owner of the vehicle has come to this Court in Appeal

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The Tribunal found that Autar Singh, the predecessor-in-interest of the respondents, was travelling in the taxi owned by the appellant and he died as a result of injuries received at the accident with the taxi. It was found that the accident occurred due to the rash and negligent driving by the driver of the car. The claim was held to be within time.

Learned counsel for the appellant raised a fresh point which was not urged before the Tribunal, namely that the Tribunal was not competent to entertain the claim against the appellant as the insured person. The finding that the accident was caused due to the negligence of the driver was also challenged. Learned counsel urged that the assessment of compensation by the Tribunal was unfair and incorrect.

In support of the first submission it was urged that the Motor Accidents claims Tribunal constituted by the Motor Vehicles Act was a statutory Tribunal. It had no general powers like a civil court. Its jurisdiction was dependent upon the provisions of the Motor Vehicles Act, and under it the Tribunal can entertain claims for compensation only against the insurer. The claim of the respondents in so far as it proceeded against the appellant, who was the insured, was incompetent. In support, learned counsel invited our attention to s. 96 of the Motor Vehicles Act. Under this section, where

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a judgment in respect of any liability covered by an insurance policy is obtained against the person insured by the policy, the insurer is liable to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder as if he were the judgment-debtor. Under sub-s. (2) thereof the insurer is not liable in respect of any such judgment unless the court gives notice of the proceedings to the insurer and permits it to defend the action.

This provision speaks of a 'judgment', 'decree' and 'court'. It was urged that this shows that the insured person can be made liable for claims of compensation in a court which can pass a decree. The claims Tribunal is not a court of law, properly so called. It under s. 110-B can only make an award. It has no power to pass a decree. These provisions indicate that the Motor Vehicles Act does not contemplate adjudication of claims against persons other than the insurer before the Tribunal created under that Act. It leaves such claims to be decided by civil courts.

In addition learned counsel sought support from s. 110-B which provides—

"Award of the Claims Tribunal—On receipt of an application for compensation made under s. 110-A, the Claims Tribunals shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer."

Learned counsel emphasised the last clause which provides that the Claims Tribunal shall specify the amount which shall be paid by the insurer, and argued that this clearly shows that the insurer alone is liable before the Claims Tribunal. If any one else was also to be made liable, there would have been a provision for specification of his share of the liability. It was urged that the Legislature made this clear by the Motor Vehicles (Amendment) Act, 56 of 1969 by which the following phrase was added after the words 'the insurer' occurring at the end of s. 110-B:

"or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be"

We are, however, not inclined to accept the submission S. 96 is headed as: "Duty of insurers to satisfy judgments against persons insured in respect of third party risks" It primarily deals with the insurer Its purpose is not to define or limit the liability of the insured person.

S 110-F bars the jurisdiction of civil courts. It provides—

"110-F. Bar of jurisdiction of civil courts.—Where any Claims Tribunal has been constituted for any area, no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area"

This provision shows that the Legislative intent was to bring all claims for compensation within the jurisdiction of the Claims Tribunal. The jurisdiction of the civil court was barred. The jurisdiction was barred in relation to "any question" relating to any claim for compensation which may be adjudicated upon by the

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Claims Tribunal. According to the submission made on behalf of the appellant, a claim for compensation against the insurance company would be barred before the civil court because it could be adjudicated upon by the Claims Tribunal. If that be so, then any question relating to such claim will be barred from the civil court. The phrase "any question relating to any claim for compensation" is so wide that it will obviously include the questions of fact or law which the Claims Tribunal can adjudicate against the insurer, and which may also arise in a suit for compensation that a person may file against the insured person in the civil court in respect of the same accident. A claim for compensation against the insurance company is entertainable by the Tribunal, even if a claim for compensation against the insured person arising out of the same accident be competent before the civil court, the civil court will, in view of s. 110-F, be barred from entertaining any question relating to such an accident. S. 110-F prohibits the civil court from deciding any such question. This would mean that the civil court cannot grant relief against the insured person at all. This destroys the very basis of the submission made before us. Learned counsel for the appellant assumed that the respondents could validly file a suit and obtain a decree for compensation against the insured person, from the civil court

S. 110-B does not provide any support to the appellant. Under it the Claims Tribunal makes an award determining the amount of compensation. If the submission is right, the only person against whom the Tribunal can make an award is the insurer: then there was no point in expressly providing that in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer. This clause would have meaning only if it was contemplated that there

may be more than one defendant before the Tribunal and the Tribunal may make an award of compensation against the insurer as well as other persons

The amendments made in s 110-B only make explicit what till then was implicit in the provision, namely that the Tribunal will specify the amounts which shall be payable by the insurer even though the award against the owner or the driver of the vehicle may be collective. The Supreme Court, this Court as well as the High Courts of Punjab, Punjab and Haryana and Mysore, have entertained claims against persons other than the insured: see *Sheikhupura Transport Co v Northern India Transporters Insurance Co. Ltd.* (1); *D.K. Gupta v. Pilokhri Brick Kiln* (2); *Nand Singh v Punjab Roadways* (3); *State of Punjab v. V. K. Kalia* (4) and *Seethamma v Benedict D'Sa* (5). In our opinion, the Claims Tribunal validly entertained the claim against the appellant.

Coming to the merits of the appeal, we may note that the learned counsel for the appellant did not challenge the finding that the taxi in question met with an accident on September 11, 1969, as alleged on behalf of the plaintiff-respondents. He also did not question the finding that Autar Singh died as a result of injuries received at the accident. Learned counsel, however, attacked the finding that the accident was caused by the rash and negligent driving of the taxi. Balak Ram (P. W. 8) and Kashi Prasad Tewari (P. W. 9) are the eye-witnesses of the occurrence. Balak Ram was a passenger travelling in the taxi in question. Kashi Prasad Tewari was coming on a bicycle. He saw the taxi and its involvement in the accident.

According to Balak Ram, the driver was running the taxi at a very high speed. He cautioned him, but the

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(1) A.I.R. 1971 S.C. 1624

(2) 1971 A.L.J. 998

(8) A.I.R. 1968 Pun. 214

(4) A.I.R. 1969 Pun and Har. 172.

(5) A.I.R. 1967 My. 11

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driver made no response and continued to drive the taxi very fast. Shortly prior to the occurrence the driver engaged this taxi in a racing competition with two other taxies. The three involved taxies used to overtake each other. At the time of the occurrence the taxi in question was behind the other two. The driver made an effort to overtake the taxi in front of it. He did so at a great speed and while doing so the taxi skidded and after travelling for a few paces struck a shisham tree situate on the road-side, head-on. The front portion of the taxi was totally smashed. The steering-wheel drove into the neck of the driver, causing his death instantaneously. All the passengers of the taxi were grievously hurt. Autar Singh became unconscious. Kashi Prasad Tewari (P. W. 9) corroborates Balak Ram. His presence also cannot be doubted because he immediately after the accident made a first information report at the nearest police station, whereupon the station in charge, P. S. Krishna Nagar, Sri Virendra Pal Singh Sirohi (P. W. 6) rushed to the scene of the occurrence and found the taxi smashed against a shisham tree. Autar Singh was lying unconscious. The driver lay dead. The other passengers were also hurt. The injured persons were sent to the hospital, where according to this witness, Autar Singh died.

According to these witnesses, it was drizzling at that time and the road was wet. The appellant led no evidence on this point.

The facts speak for themselves. The driver of the taxi in question was speeding and had engaged himself in a racing competition with two other taxies. Thus he did while it was drizzling and the road was wet. While trying to overtake another taxi the car skidded at the road-side. It dashed against a tree with such force that the front portion of the car was smashed out of existence.

and the steering-wheel thrust itself into the neck of the driver killing him. There can be no manner of doubt that the driver of the car had not taken the usual precaution of checking his speed in view of the wet condition of the road in which a car is liable to skid if driven fast. The force of the impact of the car on the tree, shows that the car must have been at a very high speed at that time. These facts clearly mean that the driver was rash and negligent. We have no hesitation in affirming the finding of the Tribunal on this point.

Now remains the question of assessment of compensation.

Under s. 110-B the Claims Tribunal makes an award determining the amount of compensation which appears to it to be just. On the question as to what is just compensation, the Supreme Court in *Gobald Motor Service v. R. M. K. Veluswami* (1) referred to the observations of LORD WRIGHT in *Daves v. Powell Duffryn Associated Collieries Ltd.* (2) that the damages are to be based on the reasonable expectation of the pecuniary benefit or benefit reducible to money value. They also relied upon the observations of VISCOUNT SIMON in *Nance v. British Columbia Electric Co. Ltd.* (3) :

“The claim for damages . . . falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward, what sums during that period would he probably have applied out of his income to the maintenance of his wife and family ?”

(1) A.I.R. 1962 S. C. 1

(2) 1942 A.C. 601 (611)

(3) 1951 A.C. 601 at 614

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In *Sheikhupura Transport Company's* case (1) the Supreme Court re-affirmed its decision in *Gobald Motor Service* (2). It held that the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever sources could come to them by reason of the death, that is, the balance of loss and gain to a dependent by the death must be ascertained.

In *G. K. Subramonia Iyer v. T. K. Nani* (3) the Supreme Court observed that in order to succeed the plaintiff must show that he has lost a reasonable probability of pecuniary advantage.

In relation to the death of the bread-winner of the family the Supreme Court referred to the following passage in *Winfield on Torts*, 7th Edn, at page 135.

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a *datum* or basic figure which will generally be turned into a lump sum by taking a number of years' purchase. That sum, however, has to be taxed down by having regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt. The number of years' purchase is left fluid, from twelve to fifteen has been quite a common multiple in the case of a healthy man, and the

(1) A.I.R. 1971 S.C. 1621.

(2) A.I.R. 1962 S.C. 1.

(3) A.I.R. 1970 S.C. 876.

number should not be materially reduced by reason of the hazardous nature of the occupation of the deceased man "

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In accordance with these principles we have to ascertain the normal income of the deceased and then to find how much was required or expended by him for his own personal and living expenses. Thereafter we shall have to see whether the circumstances of the case demand any further taxing down of the basic figure.

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The Tribunal below has recorded a finding that Autar Singh deceased was about 50 years old at the time of the accident. This finding was not challenged before us by either party. We have perused the evidence and we find ourselves in agreement with this finding.

It is admitted that the deceased Autar left two widows and 7 minor children. The two widows, namely Smt Amrit Kaur (P W 3) and Smt Gur Bachan Kaur (P. W. 1) appeared in the witness-box. They stated that the average income of the deceased was Rs 500 to Rs.550 per month. Major Hansraj (P W 5), a nephew of the deceased, corroborated the widows and stated that the deceased's income was about Rs.500 to Rs 550 per month. He was carrying on a provisions store at his residential place and was also doing money-lending business on a small-scale. He was maintaining both his wives along with his children. The family of the deceased had no ancestral or other property. Their sole source of livelihood was the income of the deceased. According to Major Hansraj, at his death Autar Singh left materials worth about Rs 15,000 in the provisions store. He could not tell how much of the materials were taken by the deceased on credit. These witnesses have admitted that Autar Singh was not paying income-tax. The appellant led no evidence on

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this point. We find no valid ground to disbelieve the two widows and the nephew. They are the best persons to know the carry-home income of the deceased. On behalf of the appellant it was urged that since Autar Singh was not paying income-tax, his income must not have been more than the minimum exempted from income-tax, and on this basis it was argued that the Tribunal below was justified in holding that his monthly income was about Rs.300. A small businessman having an average income just above the non-taxable limit may not have bothered to file a return or pay income-tax. The fact that he did not pay income-tax would not mean that really his income was less than the minimum exemption limit. In our opinion, the evidence indicates that the average monthly income of the deceased was Rs.500 and we hold accordingly.

The deceased was living along with his two widows and 7 minor children. In our opinion, a sum of Rs.100 can be deducted for the deceased's own living expenses. The deceased must have also been saving some part of his income for his business needs and other personal requirements. Under this head another sum of Rs.100 may be deducted leaving a balance of Rs.300 per month which he could be held applying to the needs of his family. This works out to Rs 3,600 per year.

Relying upon the observations in Winfield on Tolls as approved by the Supreme Court, learned counsel urged that a multiple of twelve would be sufficient in the case of the deceased because he was aged 50 years at the time of his death. We are prepared to accept this submission without discussing it because in our opinion it will not help the appellant. Capitalising the basic sum of Rs.3,600 by twelve years purchase the compensation amount will come to Rs 43,200. If from this sum of Rs.15,000, the value of the provisions

which came to the claimants because of the death of the deceased, is deducted, the balance is Rs 28,200. The Tribunal below assessed the compensation at Rs.26,400. On our findings there is no room for any further reduction. Since the claimants have not come up in appeal, we need not enhance the compensation. In our opinion, the compensation assessed by the Tribunal below was just and proper.

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In the result, the appeal fails and is accordingly dismissed with costs.

Appeal Dismissed

APPELLATE CIVIL

Before Mr. Justice S. D. Khare and Mr. Justice K. B. Srivastava*

STATE OF U. P. AND OTHERS ... APPELLANTS,

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SURAJ BHAN PANDEY AND OTHERS ... RESPONDENTS.

Essential Commodities Act, 1955, s. 3 (1)—Power Under—Storage of essential commodity if, covered by the language under s. 3(1), sub-s (1) and (2)—Relative position of—Sub-s (2) cannot be read as restrictive of the generality of power conferred by sub-s (1).

The power under sub-s (1) of s. 3 is couched in very wide language. The exercise of the power may be either regulatory or prohibitory, or may partake of both these characters. Storage is clearly implied in the wide language used in sub-s. (1) and the Central Government has the power to regulate or prohibit storage of an essential commodity. The argument that storage is not within the ambit of sub-s. (1) because it

* While sitting at Lucknow

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occurs in cl. (d) of sub-s (2) is not well founded. Sub-s (1) is the reservoir or fountain of the totality of powers envisaged thereunder whereas the specified powers under the various clauses of sub-s (2) are mere streams or tributaries that flow out of that reservoir or fountain. The use of the words "without prejudice to the generality of the powers conferred by sub-s (1), an order made thereunder may provide" for the specific powers under cls (a) to (j) of sub-s (2) itself indicates that the powers specified in those clauses are illustrative of the general power embodied in sub-s (1). Sub-s (1) is exhaustive of the powers, sub-s (2) merely gives an illustrative list of some of those powers and cannot be read as restrictive of the generality of the powers conferred by sub-s (1).

Emperor v. Sibnath Banerji (1) and *Aziz Ullah v. State of U. P.* (2) relied on.

—, 1955, s. 3(1) and (2)—Words "Regulating and prohibiting"—Meaning of—Distinction between—Cl. (d) deals with the power to regulate and not to prohibit—Delegation of power under s. (d)—Delegatee has no authority to prohibit "storage".

"Regulating and prohibiting" are two distinct and separate attributes of power under s. 3. The power to regulate portends the idea of control; governance and direction, while the power to prohibit conveys the sense of the imposition of a ban, or the placing of a restraint or restriction. Cls (a), (d) and (g) of sub-s (2) speak of the power to regulate, cl. (e) confers the power to prohibit and the remaining cls (b), (c), (f), (h), (i), (ii) and (j) though they do not mention that they are illustrative of the power to regulate, impliedly partake the character of that power. Cl. (d) has relation to the power to regulate and has no connection whatsoever with the power to prohibit. On the footing of the delegation made under cl. (d) the State Government has derived the power as a delegate to regulate "storage" but has no authority to prohibit "storage". *Automobile Transport Ltd v. State of Rajasthan* (3) and *State of Mysore v. H. Sanjeevshi* (4), relied on.

U. P. Foodgrains (Restriction on Hoarding) Order, 1966 as amended in 1967—Validity of—Essential Commodities Act, 1955, ss. 3 and 5(b).

Where, the Central Government by notification under s. 5(b) of the Essential Commodities Act directed that its powers under sub-s. (1) of s. 3 of the Act to make orders to provide for the matters specified in cls (a) to (f) and (h) to (j) of the sub-s. (2), shall in relation to food stuffs be exercisable also by the State Government and in pursuance of it the State Gov-

(1) A.I.R. 1945 P. C. 156

(2) A.I.R. 1964 S. C. 264.

(3) A.I.R. 1962 S.C. 1406

(4) A.I.R. 1967 S.C. 1189.

ernment issued the U P Foodgrain (Restrictions on Hoarding) Order whereby it fixed a quantitative limitation on the hoarding of grain by the licencees in Form B under the U P. Foodgrains Dealers Licencing Order, 1964

Held, the power to pass an order fixing a quantitative limitation on the hoarding of grain is not within the specific power under cl (d) of sub-s (2) of s 3 of the Essential Commodities Act, it is within the general power under sub-s (1) of s 3, this power was not delegated to the State Government with the result the unpugned order was beyond the scope of the delegated authority of the State Government and as such was illegal and void

Atuleya Kumar v. Directorate of Procurement and Supply (5) dissented from *Sujan Singh v. State of Haryana* (2) relied on

Special Appeal no 4 of 1969 against the order and judgment, dated November 8, 1968, passed by L PRASAD, J in Writ Petition no. 631 of 1967.

Chief Standing Counsel, for State.

Shanti Bhushan, for the respondent

K B SRIVASTAVA, J.—This special appeal arises out of the following facts.

Under sub-s. (1) of s. 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act), if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Under sub-s. (2) of this section, without prejudice, to the generality of the powers conferred by sub-s (1), an order made thereunder may provide—

(a);

(b);

(c);

(1) A.I.R. 1959 Cal. 518.

(2) A.I.R. Pun. and Har. 363.

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(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption, of any essential commodity;

(e);

(f);

(g);

(h);

(i);

(ii);

(j);

Under cl (b) of s. 5, the Central Government may, by notified order, direct that the power to make orders under s. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such State Government as may be specified in the direction. The Central Government acted under s. 5 (b) and on November 15, 1958, issued the following notification:

"In exercise of the powers conferred by s. 5 of the Essential Commodities Act, 1955 (10 of 1955) the Central Government hereby directs—

(a) that the powers conferred on it by sub-s. (1) of s. 3 of the said Act to make orders to provide for the matters specified in cls. (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-s (2) thereof shall, in relation to food-stuffs, be exercisable also by a State Government.

."

Under this delegated power, the State Government of U. P. issued the U. P. Foodgrains (Restrictions on Hoarding) Order, 1966 whereby a licensee in Form B under the U. P. Foodgrains Dealers Licensing Order, 1964 could hold in stock up to 1000 quintals of one kind of grain and up to a total quantity of 2500 quin-

tals of all kinds of grain. This Order was modified by the U. P. Foodgrains (Restrictions on Hoarding) (Amendment) Order, 1967 which came into force on February 1, 1967. Under the amended Order, a licensee in Form B could hold in stock up to 250 quintals only of a particular kind of grain and up to a total quantity of 1000 quintals only of all kinds of grain.

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The respondent Surajbhan Pandey has whole-sale grain business at Katarniya Ghat in the district of Bahraich and holds a licence in Form B under the U. P. Foodgrains Dealers Licensing Order, 1964. The Sub-Divisional Officer-cum-Food Officer, Nanpara, appellant no. 3, raided the business premises of the respondent on March 15, 1967 and finding the stock of all kinds of grains in excess of 1000 quintals, seized the same and made a first information report at P. S., Sujauli which ultimately resulted in the prosecution of the respondent before the Sub-Divisional Magistrate, Nanpara, appellant no. 2, under s. 7 of the Act for contravention of the U. P. Foodgrains (Restrictions on Hoarding) Orders, 1967 passed under s. 3 of the Act. It is in these circumstances that he instituted Writ Petition no. 631 of 1966 against the aforesaid two officers and the State of U. P. (Appellant no. 1) praying for the issue of a writ of *certiorari* quashing the U. P. Foodgrains (Restrictions on Hoarding) Order, 1966, as amended in 1967 (hereinafter referred to as the impugned order), and the charges under ss. 3/7 of the Act and for the issue of a writ of prohibition forbidding appellant no. 2 to continue the criminal prosecution, and for a writ of *mandamus* commanding him to release the seized stock, *inter alia*, on the ground that the impugned order was beyond the scope of the delegated authority of the State Government and as such was illegal and void,

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The appellant joined issues by a counter-affidavit wherein they took the plea that the impugned order falls fairly and squarely within the ambit and scope of the authority delegated under cl. (d) of sub-s (2) of s. 3 of the Act. The alternative case taken by them was that if for any reason it be found that the order is not covered by cl. (d), it would be covered by sub-s (1) of s. 3 and the Central Government had not only the power to delegate its powers under sub-s. (1) but it had also actually delegated it and, therefore, the impugned order is not open to challenge.

The learned single Judge held that (1) an order fixing a quantitative limitation on the holding of grain, whether of one or several kinds, cannot be made in exercise of a regulatory power under cl. (d); (2) that such an order can be made only in exercise of a prohibitory power under sub-s. (1); (3) that the power of the Central Government under sub-s (1) is not delegable, and (4) that in fact also, it was not delegated; and in view of these findings of his, he allowed the writ petition and issued the various writ prayed for.

In this special appeal before us, all these four points have been canvassed. However, in view of our findings on points nos. 1, 2 and 4, it would not be necessary to express any opinion regarding the third point.

An analytical scrutiny of sub-s. (1) of s. 3 will make it clear that—

(a) the Central Government has to form an opinion that it is necessary or expedient to issue orders,

(b) the factors which must furnish the foundation for the formation of the opinion are—

(i) maintaining or increasing supplies of any essential commodity, or

(ii) securing their equitable distribution and availability at fair prices

(c) upon the formation of the opinion, the Central Government may, by order—

(i) either provide for regulating, or

(ii) provide for prohibiting.

the production, supply and distribution of an essential commodity and trade and commerce therein.

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The power under sub-s. (1) is couched in very wide language. The exercise of the power may be either regulatory or prohibitory or may partake of both these characters. Again, the power of regulating or prohibiting may be in respect of the production, supply and distribution of an essential commodity and trade and commerce therein. Now, storage of a particular commodity in the course of trade and commerce is a normal and common feature. A whole-seller or retailer has to build up a stock of a particular commodity or commodities for future transactions. This must be taken to be in consonance with normal trade and commercial practice. Storage, therefore, is clearly implied in the wide language used in sub-s. (1) of s. 3. That being so, under sub-s. (1), the Central Government has the power to regulate or prohibit storage of an essential commodity. The argument that storage is not within the ambit of sub-s. (1) because it occurs in cl. (d) of sub-s. (2), is not well founded. In the first instance, sub-s. (1), is the reservoir or fountain of the totality of powers envisage thereunder whereas the specified powers under the various clauses of sub-s. (2) are mere streams or tributaries that flow out of that reservoir or fountain. Nothing will flow out of the reservoir or fountain if it is dry. In order, therefore, for a power to be specified in any of the clauses of sub-s. (2), it is necessary that that power must find a place in sub-s. (i). The use of the words "without prejudice to the

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generality of the powers conferred by sub-s. (1), an order made thereunder may provide" for the specific powers under cls. (a) to (j) of sub-s. (2), itself indicates that the powers specified in these clauses are illustrative of the general power embodied in sub-s. (1). Sub-s. (1) is exhaustive of the powers sub-s. (2) merely gives an illustrative list of some of those powers and cannot be read as restrictive of the generality of the powers conferred by sub-s. (1). This is the only natural construction that can be placed on s. 3 and this construction is also based on well established principles of law. We need only cite two cases in this regard. In *Emperor v. Sibnath Banerji* (1), their Lordships of the Judicial Committee had to deal with the relative positions of sub-ss. (1) and (2) of s. 2, Defence of India Act, 1939 and they delivered themselves thus—

"In the opinion of their Lordships, the function of sub-s. (2) is merely an illustrative one; the rule-making power is conferred by sub-s. (1), 'the rules' which are referred to in the opening sentence of sub-s. (2) are the rules which are authorised by, and made under sub-s. (1); the provisions of sub-s. (2) are not restrictive of sub-s. (1), as indeed is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-s. (1)'."

The same view was taken by their Lordships of the Supreme Court in *Afzal Ullah v. State of Uttar Pradesh* (2), while dealing with certain provisions of the U. P. Municipalities Act, 1916. Their Lordships said that—

"It is now well settled that the specific provisions such as are contained in the several clauses of s. 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by s. 298(1)."

(1) A.I.R. 1945 P.C. 155.

(2) A.I.R. 1964 S.C. 264.

We are of the view, therefore, that sub-s. (1) of s. 3 embraces both the power to regulate and the power to prohibit storage of an essential commodity.

Having discussed the scope and amplitude of the powers under sub-s. (1) of s. 3, it is time to advert to the question as to which power, regulatory or prohibitory, was delegated to the State Government under cl. (d) of sub-s. (2) of s. 3. A perusal of the various cls. (a) to (j) will indicate that while cls. (a), (d) and (g) speak of the power to regulate, cl. (e) confers the power to prohibit, and the remaining cls. (b), (c), (f), (h) (i), (ii) and (j) though they do not mention that they are illustrative of the power to regulate, impliedly partake the character of that power. It will at once become clear that cl. (d) has relation to the power to regulate and has no connection whatsoever with the power to prohibit. On the fact of the delegation made under cl. (d), therefore, the State Government has derived the power as a delegate to regulate "storage" but has no authority to prohibit "storage". 'Regulating' and 'prohibiting' are two distinct and separate attributes of power. They are, in our view, mutually exclusive otherwise there was no point in the Legislature using two different words "regulating" or "prohibiting" if both the words were intended to convey the same meaning. The power to regulate portrays the idea of control, governance and direction, while the power to prohibit conveys the sense of the imposition of a loan, or the placing of a restraint or restriction. The power to regulate the production, supply and distribution of an essential commodity and trade and commerce therein may easily comprehend and embrace the power to control or govern these matters by issue of licences and permits, or in some other manner, or by controlling transport, warehousing or price, or by regulating sale to specified persons or class of persons, or for main-

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tenance of books of accounts or for inspection of such books of accounts, or for imposition of fees for issue of licences and permits or for search and seizure of stock for contravention of any regulated matter or for other subsidiary and ancillary subjects. On the other hand, the power to prohibit conveys a wholly contrary idea, for example, the imposition of a total or partial ban or the imposition of certain restrictions with regard to production, supply and distribution of an essential commodity and trade and commerce therein. As observed by their Lordships of the Supreme Court in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* (1). "Restrictions obstruct the freedom, whereas regulations promote it, we may also profitably refer to the decision of their Lordships of the Supreme Court in *State of Mysore v H. Sanjeeviah* (2). In that case, s. 37, Mysore Forest Act, authorised the State Government to make rules 'to regulate the transit of any forest produce'. The Mysore Government framed rules to regulate the transit of timber. The rules provided that no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Sch. A, unless such forest produce was accompanied by a permit prescribed under r. 3. By subsequent notifications, the State of Mysore added two provisos to r. 2 to the effect that no such permit shall authorise any person to transport forest produce between sunset and sunrise but permission may be granted to timber merchants to transport timber up to 10 p.m. under certain conditions. By the terms of the two provisos there was an absolute prohibition against transportation of forest produce between the hours of 10 p.m. and sunrise, and a qualified prohibition between the hours of sunset and 10 p.m. It was contended on behalf of the State of Mysore that these

(1) A.I.R. 1962, S.C. 1466.

(2) A.I.R. 1967 S. C. 1189.

two provisos were regulatory and not prohibitory. Their Lordships decided this controversy in the following terms:

"Power to impose restrictions of the nature contemplated by the two provisos to r. 2 is not to be found in any of the clauses of sub-s. (2) of s 37. By sub-s (1) the State Government is invested with the power to regulate transport of forest produce 'in transit by land or water'. The power which the State Government may exercise is, however, power to regulate transport of forest produce, and not the power to prohibit or restrict transport. *Prima facie*, a rule which totally prohibits the movement of forest produce during the period between sunset and sunrise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permits transport, subject to certain conditions devised to promote transport; such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good . . . The power conferred upon the State Government is merely 'to regulate the transit' of forest produce and not to restrict it. If the provisos are in truth restrictive of the right to transport the forest produce, however, good the grounds apparently may be for restricting the transport of forest produce, they cannot on that account transform the power conferred by the provisos into a power merely regulatory."

The impugned order says that a licensee in Form B shall not hold in stock more than 250 quintals of a particular kind of grain and not more than a total of 1,000 quintals of all kinds of grain. Such an order cannot be passed under cl (d) of sub-s. (2) of the Act. Cl,

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(d) itself says that the power conferred is 'for regulating'; and it does not say that it is 'for prohibiting'. A qualified restriction has been imposed on holding, or as the impugned order says on 'hoarding' of one or all kinds of grain. Such an order is a restrictive and not a regulatory one. The nomenclature of the impugned order itself suggests that the intention was to prohibit or restrict and not to regulate. The principal, as well as the amended, impugned orders are called the U. P. Foodgrains (Restrictions on Hoarding) Order. The learned Chief Standing Counsel vehemently argued that in order to make food stuffs available in localities where they were in short supply it was necessary that there should be fair and even distribution in all localities and it is because of these good intentions and salutary desire that the State Government had to pass the impugned orders. However, we are not concerned with the motive but with the validity of the order. In the net result, we are of the view that the impugned orders could have been passed only under sub-s. (1) of s. 3 and not under cl. (d) of sub-s. (2) of s. 3.

The learned Chief Standing Counsel then argued that the mention of a wrong source of power in the notification will not invalidate it if the power can be attributed to the proper source under sub-s. (1). This argument is well founded. Nevertheless, the fact remains whether the power under sub-s. (1) had been delegated or not to the State Government. We are of the view that there was no such delegation. The notification issued by the Central Government directs that its powers under sub-s. (1) of s. 3 to make orders to provide for the matters specified in cls. (a), (b), (c), (d), (e), (f), (h) (i), (ii) and (j) of sub-s. (2) shall, in relation to foodstuffs, be exercisable also by a State Government. It is clear, therefore, that what was delegated was the power to make orders in respect of the matters

specified in the clauses referred to above and not in respect of the totality of powers that fall under sub-s. (1). We may illustrate this point further by pointing out that the power specified in cl. (g) of sub-s. (2) has been specifically omitted from the notification. It cannot, therefore, be said that all the powers comprised in sub-s. (1) had been delegated when there is explicit indication that at least one was reserved. Again, if the Central Government intended to divest itself of all its powers, in relation to foodstuffs, and delegate them to State Governments, the notification would not have been worded in the manner in which it has been worded. It would have said that the powers conferred on the Central Government by sub-s. (1) of s. 3 to make orders to provide for regulating or prohibiting the production, supply and distribution and trade and commerce therein, in relation to foodstuffs, shall be exercisable also by a State Government. The Central Government did not say so in the notification. In fact, therefore, the power under sub-s. (1) of s. 3 was not made the subject-matter of delegation.

The learned Chief Standing Counsel pinned his faith on *Atuleya Kumar v. Directorate of Procurement and Supply* (1) for the proposition that the notification includes the delegation of the Central Government's general powers under sub-s. (1) of s. 3. The notification in the Calcutta case was in the following terms:

"The Central Government is pleased to direct that the powers conferred on it by sub-s. (1) of s. 3 of the said ordinance to provide for the matters specified in sub-s. (2) thereof shall in relation to foodstuffs be exercisable by any Provincial Government."

(1) A.I.R. 1958 Cal. 548.

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SINHA, J. observed thus—

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"This is undoubtedly very incompetent drafting. But I think that the meaning is reasonably clear. The matters specified in sub-s. (2), being 'without prejudice to the generality of the powers' conferred by sub-s. (1) must be held to include such powers. Thus, it cannot be said that the general powers have not been conferred upon the State, but only those specified in cls. (a) to (j) of sub-s. (2). The only limitation is with regard to the kind of the essential commodity concerned. The State Government has been given powers limited to foodstuffs only. It follows that although the State Government could not promulgate an order to acquire stock not already held under cl. (f) of sub-s. (2) of s. 3 of the Act, there is no impediment in doing so under the general powers conferred by sub-s. (1) of s. 3."

SINHA, J. had to interpret a notification which was couched in different language. It, however, intended to lay down that the delegation of powers under the various sub-clauses of sub-s. (2) will also include the delegation of all powers under sub-s. (1), then, with all respect, we find ourselves unable to agree to that view. There is no detailed reasoning given by him for that view. It should be emphasised that the various clauses speak of specific powers only and cannot comprise all the general powers that find a mention in the very wide language used in sub-s. (1). A contrary view has been taken by the Punjab and Haryana High Court in *Sujan Singh v. State of Haryana* (1). In that case, in exercise of the powers conferred by s. 5, the Central Government issued a notification directing that the powers conferred on it by sub-s. (1) of s. 3 to make orders to provide for the matters

(1) A.I.R. 1968 Pun. and Har. 868.

specified in cls. (a), (b), (c), (d), (e), (f), (h) (i), (ii) and (j) of sub-s (2) thereof shall, in relation to foodstuffs, be exercisable also by a State Government. That notification is in the same language as the notification before us. NARULA, J., speaking for the Court, held as follows:

"As the matter covered by the impugned order does not admittedly fall within any of the various clauses of sub-s. (2) of s. 3 specifically referred to in the notification under s. 5 of the Act, the impugned order is liable to be struck down on that short ground."

We are in respectful agreement with this view.

In the net result, the power to pass an order of the nature of the impugned order is not within the specific power under cl. (d) of sub-s. (2) of s. 3; it is within the general power under sub-s. (1) of s. 3; this general power was not delegated to the State Government; and in view of these findings of ours, we are of the view that this appeal has no substance and must be and is hereby dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL (F. B.)

Before Mr. Justice S Chandra, Mr. Justice J. S.

Trivedi and Mr. Justice R. L. Gulati

BHAGWAN SINGH . . . APPELLANT,

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GANGO BAI AND OTHERS . . . RESPONDENTS.

Provident Funds Act, 1925, ss. 3(2) and 5—Railways Establishment Code, Vol. I, Chap. XIII and Railway Provident Fund Rules, rr. 1338(1) and 1340 (1) (ii)—Special Contribution—Subscriber has no right to make nomination,

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Under r. 1340 (1)(i) the amount of special contribution becomes payable to the widow or widows or/and dependant children of the deceased subscriber in such shares as the controlling officer may determine. In view of s 3(2) of the Act, the determined shares of the special contribution shall vest in the mentioned dependants, namely the widows or dependant children.

Since no nomination can be legally made, no occasion will arise to invoke s. 5(1) in regard to special contribution.

—ss 3(2) and 5(1)—*Railway Establishment Code, Vol. I, Ch. XIII, and Railway Provident Fund Rules, rr. 1338(3) and 1340 (1)(ii)*—Amount of fund becomes payable to a particular dependant by reason of nomination made by subscriber—Sums to which nomination made vests in him—Nominee will become owner under s 3(2).

Nominee may be a person who is not dependant. If amount exceeds Rs.5,000 and the nominee is not dependant, the amount shall be payable only on production by the nominee of probate or letters of administration. Obviously, if the amount is in excess of Rs.5,000 it is payable to the nominee, if he is a dependant, without probate or the letters of administration.

If under the rules an amount becomes payable to a particular dependant by reason of nomination, s. 3(2) will equally apply and the sum to which the nomination relates will vest in the nominee dependant.

In such a case, the nominee dependant will become the owner under s. 3(2). He need not take recourse to s. 5(1) to establish his beneficial interest in such sum.

Second Appeal no. 2423 of 1961 from the judgment and decree, dated 22nd April, 1961 passed by R. S. BHARGAVA, District Judge, Jhansi, in Civil Appeal no. 134 of 1959.

U. N. Chatterjee, K. C. Saxena and B. C. Saxena, for the Appellant.

Radhey Shyam, for the Respondents

S. GHANDRA, J.:—A learned single Judge felt there was a conflict of decisions on the construction and inter-action of ss. 3(2) and 5(1) of the Provident Funds Act, 1925, and referred the appeal to a larger Bench.

A Division Bench recommended that the case should more properly engage the attention of a Full Bench. That is how the appeal has been laid before this Bench.

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Having heard learned counsel we feel that in view of the facts of the case, the controversy regarding the construction of s. 5(1) does not really arise. But since the appeal itself has been referred to us for decision, we proceed to do so.

S. Chandra.
J.

One Ganesh Singh was employed in the Central Railway as a fitter. He was posted at Jhansi. He was a contributor to the provident fund. He retired on February 9, 1957, but before the Provident Fund could be repaid to him he died on March 9, 1957. At his death a sum of Rs.5,129.25 stood to his credit as the Provident Fund while a sum of Rs.1,770 was payable as special contribution. The plaintiff-respondents filed a suit (no. 82 of 1958) for a declaration. They alleged that plaintiff no. 1, Smt. Gangoo Bai was the legally wedded wife of Ganesh Singh. The other plaintiffs were her sons and daughters by Ganesh Singh. Smt. Sarju Bai, defendant no. 1 had been employed as a maid servant by Ganesh Singh. Defendant no. 2, Bhagwan Singh was born as a result of Ganesh Singh's illicit relationship with Smt. Sarju Bai. She was not his legally married wife nor was defendant no. 2 his son. The defendants were not entitled to any part of the provident fund. During his life time Ganesh Singh appears to have made a nomination in favour of Bhagwan Singh, defendant no. 2 in respect of his provident fund. On its strength the defendants were claiming that they were entitled to the entire sum standing to the credit of Ganesh Singh in his provident fund account including the special contribution. The plaintiffs claimed a declaration that the plaintiffs alone were entitled to it.

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In defence it was pleaded that Sarju Bai was the legally wedded wife of Ganesh Singh and defendant no. 2 was his lawful son. The nomination created a beneficial interest in favour of defendant no. 2 and he alone was entitled to get and appropriate the provident fund as well as the special contribution.

The trial court upheld the plaint case and, repelling the defence, decreed the suit. On appeal, however, it was found that Sarju Bai was the legally married wife of Ganesh Singh and Bhagwan Singh was his legitimate son. The nomination in favour of defendant no. 2 was held invalid. Both the widows and their children were held entitled to a 1/9th share each in the provident fund and the special contribution.

Aggrieved, the defendants have come to this Court in second appeal.

The appellants' case is that Ganesh Singh having made a nomination in favour of defendant no. 2 in accordance with the Provident Fund Rules, he alone was the owner entitled to receive the amount mentioned in the nomination, to the exclusion of all other persons. There is no dispute that the Provident Fund Act, 1925, applies to this case. For the appellants reliance was placed upon s. 5(1) of the Act. Learned counsel for the respondents urged that s. 5(1) only entitles the nominee to receive the amount. It does not make him the owner of the money. S. 3(2) of the Act vested the amount in the dependants. It was submitted that s. 3(2) would govern the present case.

The material provision in s. 3(2) of the Act is that where any sum is, under the rules of the Fund, payable to any dependant, it shall vest in the dependant. The relevant part of s. 5(1) provides, that where any nomination duly made in accordance with the Rules of the Fund purports to confer upon any person the

right to receive the whole or any part of the Fund, such person shall become entitled, to the exclusion of all other persons, to receive such sum.

S. 3(2) vests in the dependant the sum payable to him under the Rules. S. 5(1) *per se* confers exclusive entitlement to receive the nominated sum. There is conflict of opinion whether this entitlement carries or implies a beneficial interest in the nominated sum. No case, however, says that s. 5(1) overrides or modifies s. 3(2). This Court in *Administrator General v. Manager, E. I. Railway* (1), has observed that a nomination made against the provisions of s. 3(2) would be invalid.

The operative efficacy of both these provisions depends on the Rules of the Fund. For s. 3(2), the rules must make the sum payable to any dependant. S. 5(1) requires a nomination duly made in accordance with the Rules.

In order to apply them, the rules will have to be scrutinised.

The deceased Ganesh Singh was governed by the State Railway Provident Fund Rules given in Chap. XIII of the Indian Railway Establishment Code, Vol. I. Rule 1302 gives the definitions. Sub-cl. (2) defines "children" to mean legitimate children and step children. It shall also include adopted children. Cl. (4) defines "dependant" to mean any of the following relatives of a deceased subscriber, namely, a wife, husband, parent, child, minor brother, unmarried sister and deceased son's widow and child, and where no parent of the subscriber is alive, a paternal grandparent. Sub-cl (6) defines "family" to mean, in the case of a male subscriber, a wife or wives and children

(1) A.I.R. 1951 All. 815.

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of the subscriber, and the widow or widows and children of a deceased son of the subscriber Rr. 1338 and 1340 are relevant and material. They are as follows:

"1338. *Nominations*—(1) The Accounts Officer shall, as soon as the account is opened, invite every subscriber to make a nomination conferring the right to receive the whole or part of the amount, excluding the amount of special contribution admissible under rule 1314 that may stand to his credit in the fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable, before payment has been made.

(2) A subscriber making a nomination shall send it, if a gazetted railway servant to the Accounts Officer, otherwise, to his immediate superior.

(3) A subscriber may in his nomination distribute the amount that may stand to his credit in the fund amongst his nominees at his own discretion.

(4) A nomination made under sub-r. (2) or a declaration made before these rules came into force, may be cancelled by a subscriber by sending a notice in writing, if a gazetted railway servant to the Accounts Officer, otherwise, to his immediate superior.

(5) On the marriage or re-marriage of a subscriber who is not a Hindu, Muslim, Buddhist or any other person, exempted from the operation of the Indian Succession Act, 1925 (XXXIX of 1925), any nomination already made by him shall forthwith become null and void.

(6) A subscriber may provide in a nomination—

(a) in respect of any specified nominee, that in the event of his predeceasing the subscriber the right conferred upon that nominee shall pass to such other persons as may be specified in the nomination;

(b) that the nomination shall become invalid in the event of happening of a contingency specified therein.

(7) Immediately on the death of a nominee in respect of no special provision has been made in the nomination under cl. (1) of sub-r. (6) the nomination being thereon rendered partially or wholly null and void or on the occurrence of any event by reason of which the nomination becomes invalid in pursuance of sub-r. (5) or of cl. (b) of sub-r. (6) the subscriber may send to the Accounts Officer an intimation of this occurrence and may also send a fresh nomination made in accordance with the provisions of this rule.

(8) A nomination or its cancellation shall take effect to the extent that it is valid, on the date on which it is received by the Accounts Officer or in the case of a non-gazetted railway servant on the date on which it is received by his immediate superior.

(9) Nothing in these rules shall be deemed to invalidate a nomination duly made before these rules came into force but their validity will be subject to the provisions of sub-s. (1) of s. 5 of the Provident Funds Act, 1925."

"1340. *Persons to whom accumulations are payable*—(1) Subject to the provisions of r. 1341 on the death of a subscriber before the amount standing to his credit has become payable or where

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the amount has become payable, before payment has been made—

(i) the amount of the special contribution credited to the subscriber's account under r. 1314 shall become payable to the widow or widows or/and dependent children of the deceased subscriber in such shares as the controlling officer may determine;

(ii) if a nomination made by the subscriber in accordance with r. 1338 subsists, the amount standing to his credit in the fund, excluding any amount which becomes payable under cl. (i) or that part thereof to which the nomination relates, shall become payable to his nominee or nominees in accordance with such nomination; provided that if the amount exceeds rupees five thousand and the nominee is not a dependent, it shall be payable only on production by the nominee of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a succession certificate entitling him to receive payment of the amount; and

(iii) if no nomination subsists, or if the nomination relates only to a part of the amount standing to his credit in the fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall, subject to the provisions of cl. (i), become payable to the members of his family in equal shares and if there are no such members shall become payable—

(a) if the amount does not exceed rupees five thousand to any person appearing to the Accounts Officer to be entitled to receive it;

(b) if the amount exceeds rupees five thousand, to any person who produces probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a succession certificate entitling him to the payment of the amount:

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Provided that no share shall be payable to—

(1) sons who have attained legal majority;

(2) sons of deceased son who have attained legal majority;

(3) married daughters whose husbands are alive;

(4) married daughters of a deceased son whose husbands are alive;

if there is any member of the family other than those specified in clauses (1), (2), (3) and (4):

Provided further that the widow or widows and the child or children of a deceased son shall receive between them in equal parts only the share which that son would have received if he had survived the subscriber and had not attained the age of legal majority at the time of the subscriber's death.

(2) The General Manager may delegate powers under sub-r. (1)(i) of this rule to a head of a department or a Divisional Superintendent, as the case may be, or in respect of non-gazetted subscribers, to a District Officer."

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R. 1338(1) provides for nomination in respect of the Fund, excluding the amount of special contribution. Under r. 1340(1)(ii) the amount to which the nomination relates, excluding the amount of special contribution [which becomes payable under r. 1340(1)(i)] becomes payable to the nominee. These two rules exclude the special contribution from the subscriber's right of nomination. The subscriber is not competent to make any nomination for it.

Under r. 1340(1)(i) the amount of special contribution becomes payable to the widow or widows or/and dependant children of the deceased subscriber in such shares as the controlling officer may determine. In view of s. 3(2) of the Act, the determined shares of the special contribution shall vest in the mentioned dependants, namely the widows or dependant children.

Since no nomination can be legally made, no occasion will arise to invoke s. 5(1) in regard to special contribution. We need not hence consider the academic question whether the right to receive under s. 5(1) imports ownership, as far as the special contribution is concerned.

The plaintiffs' claim for this amount was premature, because there is no evidence that any share has as yet been determined by the Controlling Officer. The defendants' claim to this amount, based as it is on the alleged nomination, is illegal, because no nomination could, under the Rules of the Fund, be made for it. In relation to this amount the proper relief will be to declare that both sets of parties will be entitled to such shares in the special contribution as the controlling officer may determine.

We now come to the balance of the provident fund.

In view of r. 1338(3) there can be more than one nominee amongst whom the subscriber can distribute his fund. R. 1340(1)(ii) contemplates that a nominee

may be a person who is not a dependant. Under it, if the amount exceeds Rs.5,000 and the nominee is not a dependant, the amount shall be payable only on production by the nominee of probate or letters of administration. Obviously, if the amount is in excess of Rs.5,000 (as it is in the present case—the amount being Rs.5,129.25) it is payable to the nominee, if he is a dependant, without probate or the letters.

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When under the rules of the Fund, an amount becomes payable to "any" dependant, s. 3(2) is attracted and the amount vests in that dependant. S. 3(2) does not specify how the amount should become payable to a dependant. The only condition is that it should become payable under the Rules of the Fund. If under the Rules an amount becomes payable to a particular dependant by reason of nomination, s. 3(2) will equally apply, and the sum to which the nomination relates will vest in the nominee dependant.

In such a case, the nominee dependant will become the owner under s. 3(2). He need not take recourse to s. 5(1) to establish his beneficial interest in such sum.

Here the finding of fact is that Bhagwan Singh, the nominee, was the legitimate son of Ganesh Singh. He was a dependant as defined by the Act as well as the Rules. The nominated sum vested in him alone under s. 3(2). Under s. 5(1) he undeniably acquired an exclusive right to receive the amount. The plaintiffs' claim to this amount was clearly misconceived.

In this view, the question if the right to receive under s. 5(1) carries or confers a beneficial interest does not really arise. Even if it is held that it does not make the nominee the owner, the plaintiffs cannot succeed. We hence do not deem it worthwhile to enter that controversy.

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In the result, the appeal succeeds and is allowed in part. The suit is decreed for a declaration that the parties to the suit shall be entitled to the special contribution in such shares as the controlling officer may determine. On our findings, the plaintiffs' suit for a declaration in respect of the rest of the amount of provident fund is dismissed. In view of the divided success, the parties shall bear their own costs throughout.

Ordered accordingly.

CIVIL REVISION

Before Mr. Justice K N. Srivastava

SMT. SUPRIYA

APPLICANT,

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VASUDEV DANG

OPPOSITE-PARTY.

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Hindu Marriage Act, 1955, s. 19—*Husband residing at Dehra Dun—Wife going there to settle dispute with husband—Dehra Dun Court had no jurisdiction to try the petition for dissolution of marriage.*

Before the words "reside" and "last resided together" we find the words "husband and wife" which means that in order to confer the jurisdiction on a court, a petitioner must prove that the parties reside or last resided together as husband and wife. If the wife went to the husband's place only to get rid of the husband or to quarrel with him, it would not be proper to say that the parties last resided as husband and wife at that place.

That a casual visit or a temporary visit with an intention other than to reside would not confer jurisdiction under s 19 of the Hindu Marriage Act to entertain the petition

Civil Revision no. 1102 of 1971 against the order of J. P. CHATURVEDI, District Judge, Dehra Dun, dated July 1, 1971.

R. K. Jain, for the Applicant.

N. C. Rajwanshi, for the Respondent.

K. N. SRIVASTAVA, J.:—This is an application in revision against the judgment and order passed by the District Judge, Dehra Dun, upsetting the order of the Civil Judge regarding return of the plaint and holding that Dehra Dun Court had jurisdiction to hear the petition filed by the respondent under s 13 of the Hindu Marriage Act.

The petitioner filed this petition with the allegation that the parties last stayed at Dehra Dun as husband and wife and, therefore, Dehra Dun Court had jurisdiction to try the petition. This contention of the petitioner was denied by the respondent who stated that she had not gone to Dehra Dun to stay with the petitioner but had gone with the intention of totally separating herself from the petitioner and to bring back her certain articles from there.

The learned Civil Judge relied on para 9 of the petition and held as a fact that the respondent had not gone to Dehra Dun to settle with the petitioner but to settle her disputes with him. The learned District Judge did not take into consideration as to what was the intention and as to why the respondent went to Dehra Dun and came to the conclusion that for at least three days, the respondent stayed with the petitioner and this stay was enough to give jurisdiction to Dehra Dun Court. It is s. 19 of the Hindu Marriage Act which gives jurisdiction for a petition for dissolution of marriage. This section reads as below:

“Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised or the husband and the wife reside or last resided together.”

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The words 'reside' and 'last resided together' have therefore, to be interpreted for finding out as to whether this stay of three days of the respondent at Dehra Dun would come under the terms 'reside' or 'last resided together'. Before these two words, we find the words 'husband and wife'. This means that in order to confer jurisdiction to a court, a petitioner must prove that the parties 'reside' or 'last resided together' as husband and wife. If a wife went to the husband's place only to get rid of the husband or to quarrel with him, it would not be proper to say that the parties last resided as husband and wife. The word 'resided' therefore, had to be given a special meaning in connection with the relationship of wife and husband. A man residing at a particular place may go with his wife for sight-seeing at a certain place and stay there for a couple of days. That would not amount to saying that at the place of the sight-seeing, they last resided. Similarly, if a husband goes and stays at a hotel with his wife for a couple of days, it would not be correct to say that they last resided at the place where the hotel was situated.

A number of decisions have been quoted by the parties' counsel in connection with the interpretation of the words 'reside' and 'last resided together'. These cases are under different statutes and not under the Hindu Marriage Act. In the Indian Divorce Act, there is a provision that the petition for divorce can be filed where the husband and wife reside or last resided together. Therefore, we have to look into these decisions because they would be of help in deciding as to what is meant by the words 'reside' and 'last resided together' occurring in s. 19 of the Hindu Marriage Act.

In *Janak Dulari v. Narain Dass* (1), the question of interpretation of the words 'reside' and 'last resided

(1) A.I.R. 1969 Pun. 50.

together' came up for consideration. In this case, it was held that the word 'reside' implies something more than a mere brief or flying visit.

In a Full Bench decision of this court *Arthur Flowers v Minnie Flowers* (1), the question which came up for decision was as to what the word 'dwelling' meant. The following observation in this case can be read with advantage in interpreting the words 'reside' and 'last resided together':

"The petitioner merely paid a flying visit to Meerut for a temporary purpose and not with any intention of remaining. Mere casual residence in a place for a temporary purpose with no intention of remaining is not 'dwelling'."

In *Mst. Jagir Kuar v Jaswant Singh* (2), the question came up for decision as to what the word 'resides' and the words 'where he last resided with his wife' under s. 488(8) of the Code of Civil Procedure meant. While dealing with this case, the Supreme Court observed as below:

"A makes only a flying visit and he has no intention to live either permanently or temporarily in the place he visits. It cannot, therefore, be said that he 'resides' in the places he visits."

It was also observed earlier in the judgment that—

"Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of

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(1) VII A.L.J.R. 198.

(2) A.I.R. 1968 S.C. 1521.

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domicile in its technical sense. The purpose of the statute would be better served if the word 'resides' was understood to include temporary residence."

Thus all these decisions clearly go to show that a casual visit or a temporary visit with an intention other than to reside would not confer a jurisdiction under s 19 of the Hindu Marriage Act to entertain the petition

As against this, certain cases were referred by the learned counsel for the petitioner. One of these cases has been referred by the lower appellate court in its judgment. It is *M. Glarance v. M. Raicheal* (1). In this case, the facts were altogether different and soon after the divorce, the parties had separated. They had no permanent residence, but it was a fact that they stayed as husband and wife after the marriage for some time at the place where the marriage was solemnised. In the instant case, I shall presently show that the respondent did not go to Dehra Dun with the intention to stay with the petitioner howsoever temporarily as husband and wife.

The other case cited on behalf of the petitioner was *T. J. Poonen v. Rathi Varghese* (2). In this case, the parties' stay was of some permanent character and also of casual brief stay together. The stay of permanent character was taken for the purpose of jurisdiction. The other two cases cited are *Smt. S. Saroja v. P. G. Emmanuel* (3) and *Smt. Lalithamma v. V. R. Kanan* (4). These cases are also distinguishable from the facts of the present case.

Applying the above principle, it has now to be seen as to whether the residence of the respondent at Dehra Dun, howsoever temporary, was with the intention of residing there as husband and wife. The allegation in

(1) A.I.R. 1964 Mysore 67.

(3) A.I.R. 1965 Mysore 12.

(2) A.I.R. 1967 Kerala 1.

(4) A.I.R. 1966 Mysore 178.

para 9 of the petition clearly goes to show that the respondent had gone to Dehra Dun to trouble the petitioner and to get certain articles from there. The relevant portion of the paragraph is as follows:

"9. That the difference between the parties grew to such an extent that it did not appear to live with him together as the respondent was found to live with her father at Hoshiarpur and was not willing to leave her life in adultery. However, the respondent came to Dehra Dun and stayed with the petitioner in the second week of July, 1967. She made the life of the petitioner hell and she quarrelled without any reason and she wanted to get rid of the petitioner."

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All this shows that the respondent did not go to Dehra Dun to live with the petitioner as husband and wife but, according to the admission of the petitioner himself, she had gone to pick up quarrel with the petitioner and to get the relations finally broken. It was on this allegation in the petition that the Additional Civil Judge recorded a finding that the respondent had not gone to Dehra Dun to reside with the petitioner but had gone with the idea of getting a complete separation.

This allegation in para 9 of the petition has also to be judged in relation with the past history of the parties. Both the parties are said to be doctors. They were not pulling on well since long. They were quarrelling with each other with the result that the petitioner had started doubting the chastity of the respondent. There is nothing on the record to show that there was any reconciliation on account of which the respondent came to stay with the petitioner. Thus the respondent's coming to Dehra Dun for two days could not be with the intention to reside with the petitioner as his wife for howsoever a temporary period. These

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aspects of the case were not considered by the lower appellate court and the lower appellate court did not even upset the finding of the trial court that the respondent did not go to Dehra Dun with the intention to reside with the petitioner. Therefore, this finding by the trial court stands. In view of this finding which is based on evidence, the trial court, therefore, rightly held that it had no jurisdiction to try the suit and ordered for the return of the plaint.

In this view of the matter, the revision application succeeds. It is hereby allowed with costs. The judgment and order passed by the lower appellate court are set aside and the one passed by the trial court are restored. The stay order is discharged.

Revision allowed.

CIVIL MISCELLANEOUS

*Before Mr. Justice S. Chandra and Mr. Justice
J. S. Trivedi*

1972
April, 20.

KRISHNA DEVI

... PETITIONER,

v.

BOARD OF REVENUE

AND OTHERS

.. OPPOSITE-PARTIES.

U. P. Zamindari Abolition and Land Reforms Act, 1950,
*s. 333 and Rules, r. 115-N—Auction by Land Management
Committee of Abadi site—Set aside by S. D. O under r.
115-N—Revision lies to Board of Revenue*

A revision lies to the Board of Revenue under s. 333 of the U. P. Zamindari Abolition and Land Reforms Act against the order of an Assistant Collector in charge of sub-division (S. D. O.) passed under r. 115-N of the U. P. Zamindari Abolition and Land Reforms Rules, setting aside an auction of the *abadi* side by Land Management Committee.

Kishan Lal Jat v State of U P. (1) overruled.

Civil Miscellaneous Writ No 820 of 1970.

B. Dixit, for the Petitioner.

S C., for the Opposite-parties

S CHANDRA, J.:—The land in dispute appears to have been allotted by an auction in favour of Sarup Singh, respondent no. 5. The petitioner, Smt Krishna Devi, applied before the Sub-Divisional Officer under r. 115-N of the Zamindari Abolition and Land Reforms Rules for the cancellation of the allotment. The Sub-Divisional Officer allowed the application and cancelled the allotment. Aggrieved, Sarup Singh filed a revision. The Additional Commissioner referred it to the Board of Revenue with the recommendation that it should be allowed. The Board of Revenue on October 15, 1969, passed an order allowing the revision and setting aside the order of the Sub-Divisional Officer.

Thereupon, Smt Krishna Devi instituted a writ petition in this Court. At the hearing of the writ petition it was urged on behalf of the petitioner that the revision was not maintainable against the order of the Sub-Divisional Officer passed under r. 115-N. In support, reliance was placed upon a decision of BROOME, J. in the case of *Kishan Lal Jat v State of U P* (1). The learned single Judge felt that this decision requires reconsideration. He accordingly referred the following question to a Division Bench.

“Whether a revision lies to the Board of Revenue under s. 333 of the U P. Zamindari Abolition and Land Reforms Act against the order of an Assistant Collector Incharge of a sub-division (S D. O.) passed under r. 115-N of the U. P. Zamindari Abolition and Land Reforms Rules, setting aside an auction of an *abad* site by the Land Management Committee.”

(1) 1967 R.D. 184.

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We have seen the decision in *Kishan Lal's* case (1) There BROOME, J. held "A revision lies to the Board of Revenue under s. 333 only against decisions of a subordinate court ; and it cannot be said that the S. D. O. acting under r. 115-N functions as a court" The entire decision of the point is confined to this single terse sentence. The point has not been discussed and no reasons have been given.

Under s. 333 of the Zamindari Abolition and Land Reforms Act a revision lies to the Board of Revenue in any suit or proceeding decided by any subordinate court in which either no appeal lies to it or, if an appeal lies, it has not been preferred.

S. 331 provides for institution of suits in courts mentioned in column 4 of the Second Schedule. Sub-s. (2) provides for an appeal against orders and decrees so passed to courts mentioned in column 5 and sub-s (4) provides for a second appeal from the final order or decree passed in appeal under sub-s (2) to the authority mentioned in column 6 That authority is the Board of Revenue. It will thus be seen that the scheme of s. 331 read with the Second Schedule is for institution of suits in designated courts of original jurisdiction, from whose decrees or orders appeals lie to higher courts This being the hierarchy of courts envisaged by the Zamindari Abolition and Land Reforms Act, it can, within the meaning of s 333, be said that the courts of original jurisdiction given in column 4 of the Second Schedule are courts subordinate to the courts of first appeal and courts of second appeal mentioned in columns 5 and 6 ; and similarly, that the court of first appeal mentioned in column 5 is subordinate to court of second appeal mentioned in column 6 thereof Column 6 of the Schedule refers to the Board of Revenue while column 5 mentions the Commissioner.

(1) 1967 R.D. 134.

Column 4 dealing with the courts of original jurisdiction refers to several authorities like Assistant Collector, Assistant Collector, First Class, as well as the Assistant Collector in-charge of a sub-division. In many entries, like entries nos 5, 11, 20, 20-A, 30, 31, 35, 41 and 42 the court of original jurisdiction is the Assistant Collector in-charge of a sub-division

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These provisions clearly treat the Assistant Collector in-charge of a sub-division as the court of original jurisdiction, and they treat it as a court subordinate to the court of the Commissioner as well as the court of the Board of Revenue S. 333, when it uses the phrase "subordinate court" must be held to be having the same hierarchy of courts in mind as is provided for in s. 331 read with the Second Schedule. In other words, the subordinate court within meaning of s. 333 and with reference to the Board of Revenue are the court of the Commissioner and the courts of original jurisdiction mentioned in column 4 of the Second Schedule. Thus, a revision would lie to the Board of Revenue in any suit or proceeding "decided" *inter alia* by the Assistant Collector in-charge of a sub-division in which either no appeal lies to the Board or, if it does lie, it has not been preferred.

S. 3(27) of the Zamindari Abolition and Land Reforms Act provides that words and expressions like "Assistant Collector" not defined in this Act and used in the U. P. Land Revenue Act, 1901, shall have the meaning assigned to them in that Act. This shows that the term "Assistant Collector in-charge of a sub-division", as used in the Zamindari Abolition and Land Reforms Act, will have the meaning assigned to it by the Land Revenue Act

S. 15 of the Land Revenue Act authorises the State Government to appoint Assistant Collector in each

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district. S. 18 provides that the State Government may place any Assistant Collector of the First Class in-charge of one or more sub-divisions of the district, and such Assistant Collectors are called Assistant Collectors in-charge of a sub-division of a district, or a Sub-Divisional Officer. They are entitled to exercise all the powers and discharge all the duties conferred and imposed upon them by the Land Revenue Act or by any other law for the time being in force. S. 4(8) of the Land Revenue Act defines the term 'revenue court' to mean "all or any of the following authorities", that is to say, the Board and all members thereof, Commissioners, Collectors, Additional Collectors, Assistant Collectors, etc. It is true that this clause gives the definition of revenue court; but it is clear that in the Land Revenue Act, the Assistant Collector has the significance and meaning of being a revenue court. Since the term "Assistant Collector" is understood in the Land Revenue Act as being a revenue court, it will have to be taken in that sense for purposes of the Zamindari Abolition and Land Reforms Act in view of s. 3(27) thereof. Ss. 15 and 18 of the Land Revenue Act show that the Assistant Collector in-charge of a sub-division is an Assistant Collector of the First Class who has been put in such charge by the State Government. Hence, the Assistant Collector in-charge of the sub-division is the same entity known as Assistant Collector in s. 4(8) of the Land Revenue Act. The Sub-Divisional Officer would, therefore, be a revenue court within meaning of the Land Revenue Act and also within meaning of the Zamindari Abolition and Land Reforms Act. This corroborates the interpretation placed upon ss. 331 and 333 read with the Second Schedule earlier that the Assistant Collector in-charge of a sub-division is a court within meaning of these provisions.

The use of the words "courts" and "decided" in s. 333 shows that the Legislative intent was that a revision would lie under it against judicial adjudications of suits and proceedings. Administrative proceedings conducted by those very authorities would not be within the purview of s. 333. This is in consonance with s. 219, Land Revenue Act, which provides that in judicial cases and cases connected with settlement, a revision would lie to the Board of Revenue, while in non-judicial proceedings not connected with settlement a revision would lie to the State Government.

It was urged that proceedings under r. 115-N are non-judicial. In our opinion, the submission is misconceived. Under r. 115-N, the Assistant Collector in-charge resolves *a lis* between two parties. In view of sub-s. (3), he makes a "decision" in the case. His decision is final. Under sub-r. (iii), he has to hear the parties. Thereafter, he decides the case by a written order which records the reasons for the conclusions reached by him. Further, he can cancel the allotment only on grounds mentioned in sub-r. (i). These various features leave no room for doubt that the Assistant Collector discharges judicial functions under r. 115-N. These proceedings cannot possibly be held to be administrative in nature.

The proceedings under r. 115-N being judicial in nature, and the Assistant Collector being a court subordinate to the Board of Revenue, a revision against his orders is maintainable.

It is true that r. 115-N(3) provides that the decision of the Assistant Collector shall be final. It is well-settled that such finality does not restrict the revisional jurisdiction conferred upon higher courts. In the case of *Shah Chaturbhuj v. Mauji Ram* (1), a Full Bench of this Court interpreted the phrase "the decision of the revenue court shall be final" occurring in s. 5 of the U. P.

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(1) A.I.R. 1988 All. 456.

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Agriculturists Relief Act, 1934, as not depriving the higher courts of revisional powers under s. 115 of the Civil Procedure Code. The Full Bench held that the finality mentioned in the provision only meant that there was no right of appeal vesting in the litigants against such an order. In our opinion, this Full Bench decision equally applies to s. 333. The finality mentioned by sub-r. (3) of r. 115-N cannot whittle down the amplitude of the revisional power conferred upon the Board of Revenue by s. 333 of the Zamindari Abolition and Land Reforms Act.

In our opinion, *Kishan Lal's* case (1) was not correctly decided. We are inclined to the view that the revision was maintainable and was validly entertained by the Board of Revenue. We would answer the question referred to us in the affirmative.

Let the papers be returned to the learned single Judge with our opinion and answer.

Question answered.

APPELLATE CIVIL

Before Mr Justice K. B. Asthana

CHITRA TALKIES (BUILDINGS) THROUGH
 SANSAR CHAND GOHAL ... APPELLANT,
 v.

1972
 April, 21. DURGA DAS MEHTA . RESPONDENT.

Code of Civil Procedure, 1908, s. 47, O. XXI, r. 2—Decree for ejectment—Before eviction judgment-debtor becoming partner of decree-holder's firm—Execution of decree—Objection under s. 47 that the decree has become inexecutable—Maintainable.

A transaction entered into between a decree-holder and a judgment-debtor which makes a decree ineffective can be set up as a bar to an execution even if it has not been got certified under r. 2, O. 21 C. P. C.

Held, that the judgment-debtor was entitled to set up a plea under s. 47, C. P. C. that the new tenancy created in his favour by decree-holder rendered that decree inexecutable

(1) 1967 R.D. 184.

Execution Second Appeal no. 2243 of 1970 against the judgment and decree of A. P. BHATNAGAR, District Judge, Saharanpur, dated September 23, 1970 in Execution Civil Appeal no 286 of 1969

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K. C. Saxena, for the Appellant.

Rajeshwari Prasad and *K. L. Grover*, for the Respondent.

K. B. ASTHANA, J :—This second appeal of the decree-holder arises out of an execution proceeding taken for delivery of possession by eviction of the judgment-debtor from a Cinema building known as Chitra Talkies in the city of Haradwar. In order to appreciate the controversy arising in this appeal it is necessary to refer to certain facts. The decree-holder Messrs. Chitra Talkies (Buildings) is a registered partnership. Its original partners were Mahant Shankaranand having 5/16 shares, Achroo Ram 3/16 share, D. P. Chopra 5/32 share, B. L. Chopra 5/32 share and Sansar Chand Goel 3/16 share. Durgadas Mehta, the judgment-debtor, took on lease the Chitra Talkies buildings from the decree-holder at a monthly rent of Rs 1,150 for exhibiting films. It appears that he fell into arrears. The Chitra Talkies (Buildings) through Sansar Chand Gohal then filed a suit against Durgadas Mehta, the tenant, for recovery of arrears of rent, damages and for his eviction having terminated the tenancy by a notice. This suit was registered as Suit no. 60 of 1959 in the Court of Civil Judge of Roorkee. The suit was contested by Durgadas Mehta but was decreed on September 29, 1961. Durgadas Mehta filed an appeal in the High Court from the decree but got it dismissed without pursuing it. The dismissal order was passed by the High Court on May 17, 1963. The decree-holder through Sansar Chand Gohal put the decree in exe-

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cution but for one reason or the other successive executions were not successful. Then on August 23, 1966 fresh execution proceedings were started for eviction of the judgment-debtor and it is these proceedings which have given rise to this appeal. The execution was resisted by the judgment-debtor by filing objections under s. 47 of the C. P. C. The main grounds raised by the judgment-debtor were: (1) that Sansar Chand Gohal having sold away his interest in the partnership was no longer competent to execute the decree, (2) that the judgment-debtor himself having acquired one-half interest in the partnership could not be dispossessed and (3) that in July 1965 a fresh contract of tenancy came into existence between the parties and the execution of the decree for eviction was barred.

The learned executing court on the evidence on record held that Sansar Chand Gohal had a right to execute the decree he being a partner of the decree-holder firm when the suit was filed and the judgment-debtor himself filed appeal in the High Court against the decree-holder through Sansar Chand Gohal; that the judgment-debtor by acquiring some interest in the partnership business by purchasing the shares of the original partners did not cease to be subject to the decree for eviction and was liable to be dispossessed under the decree and that the new arrangement between the partners of the decree-holder firm and the judgment-debtor in July 1965 under which the judgment-debtor was allowed to retain possession on payment of rent amounted to an adjustment of the decree and the judgment-debtor was not entitled to set up such arrangement against execution of the decree as it was not got certified by the Court within time as required by O. XXI, r. 2 of the C. P. C. The result was that the objection of the judgment-debtor under s. 47 of the C. P. C. was dismissed and the decree for dispossession of judgment-debtor

from the Chitra Talkies (Buildings) was directed to be executed. The judgment-debtor then filed an appeal before the District Judge of Saharanpur. While affirming the findings of the executing court on the question of competency of Sansar Chand Gohal to represent the decree-holder and on the question of the executability of the decree against the judgment-debtor though he had acquired an interest in the partnership business, the learned District Judge differed from the view taken by the executing court on the third point. The learned Judge held that the arrangement entered into between the parties in July 1965 was not an adjustment of the decree in execution but was a fresh contract of tenancy which operated as a bar to the execution of the decree for dispossession of the judgment-debtor with the result that the appeal was allowed and the decree-holder's application for execution was dismissed. The decree-holder has now come before this Court in second appeal from the decree passed by the lower appellate court.

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I have heard Sri K. C. Saxena, learned counsel appearing for the decree-holder appellant, and Sri Rajeshwari Prasad, learned counsel appearing for the judgment-debtor respondent.

The first contention raised by Sri Saxena for the appellant was that there was no legal evidence on record establishing the fact that a new contract of tenancy was entered into between the decree-holder and the judgment-debtor in July 1965 and the finding of the court below that such a contract came into existence is vitiated. It was submitted that the learned Judge of the court below did not take into consideration the evidence of Sansar Chand Gohal who had denied any such transaction having been entered into between the parties in July 1965. No doubt the learned Judge of the court

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below has not referred to the oral evidence of Sansar Chand Gohal who had stated that no arrangement of conferring of any tenancy rights on Durgadas Mehta, the judgment-debtor, was entered into by him on behalf of the decree-holder and the judgment-debtor was never treated by him as tenant. The witness further stated that he had always been giving receipts to the judgment debtor for whatever sum was paid as *mesne profits* or under orders of the court but never received any amount as rent. The judgment-debtor Durgadas Mehta in his evidence stated that there was a meeting of the partners in July 1965 at which the decision was taken admitting him to the tenancy of the Chitra Talkies (Buildings) with effect from August 1, 1965 and thereafter he had been paying rent every month to Sansar Chand Gohal and other partners against receipts signed by them. It is not the case of the judgment-debtor that any written lease was executed. He pleaded an oral contract of tenancy. It may be stated that in July 1965 the original partners who have been named above had ceased to be partners some having gone out transferring their interest and some having died. There was some controversy about Sansar Chand Gohal himself remaining a partner as he had also sold his interest to a third person from whom his sons are said to have repurchased the shares. However, for purposes of this appeal I would take that Sansar Chand Gohal was a partner of the firm in July 1965. The share of Mahant Shankara Nand and Achroo Ram admittedly has been purchased by the judgment-debtor Durgadas Mehta, thus he acquired half interest in the decree-holder firm. The other partners at the relevant time were Dharampal Chopra and Ashok Kumar Chopra. I would assume for the purpose of this case that Ashok Kumar Chopra was a partner though it can be disputed that he in his own capacity became a partner as the son of the deceased partner Basant Lal

Chopra. Dharampal filed an application before the executing court in which he stated that in July 1965 the partners of the decree-holder firm decided to admit Durgadas Mehta as a tenant. Chopra also filed an application making a similar statement. Then there is on the record overwhelming documentary evidence in the shape of letters and receipts showing that Sansar Chand Gohal himself after July 1965 corresponded with the judgment-debtor as a tenant and signed a number of receipts for the rent received. One of the letters which he wrote to Durgadas Mehta was to the effect that the latter should pay some money on behalf of the partnership and set it off towards future rent. It is significant to note that on the record there are a number of receipts for amounts received from the judgment-debtor Durgadas Mehta for the period prior to July 1965 which showed that the amounts were not received as rent but as *mesne profits* or as paid under orders of the court. Many of such receipts were signed by Sansar Chand Gohal. It is clear from this that Sansar Chand Gohal knew the difference between rent and *mesne profits*. That would be a circumstance militating against his bald denial in the witness-box that no arrangement was reached between the parties in July 1965 admitting the judgment-debtor to fresh tenancy of the Chitra Talkies (Buildings) for it is only after July 1965 that the receipts signed by Sansar Chand Gohal show that the amounts were received as rent. The statement of Durgadas Mehta, the judgment-debtor, made in the witness-box that he was admitted to a fresh tenancy with effect from August 1, 1965 appears to be true as it is supported by two other persons intimately connected with the partnership affairs in July 1965 and is corroborated by the documentary evidence on record in the shape of letters, cheques and receipts. I do not think by not specifically discussing the oral testimony of

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Sansar Chand Gohal and of Durgadas Mehta the finding of the learned District Judge can be said to have become vitiated inasmuch as he has in great detail scrutinised the documentary evidence on record and then recorded the finding that there was a fresh tenancy created in favour of the judgment-debtor from August 1, 1965. I have no hesitation in endorsing the finding recorded by the learned District Judge that a fresh contract of tenancy took place between the decree-holder and the judgment-debtor in July 1965 and the judgment-debtor was resettled as a tenant with effect from August 1, 1965.

It was then suggested by Sri *Saksena* for the decree-holder appellant that the judgment-debtor had not raised any plea in his objections based on creation of a new tenancy with effect from 1st August, 1965 in his favour and whatever he alleged in his application was vague and did not amount to setting up of a contract of tenancy as no particulars as required by law were supplied. I do not find any substance in this argument. I think the allegations made in the replication sufficiently indicated to the decree-holder that a bar to the execution was being pleaded on the basis of a new tenancy. The parties fully understood each other's case and adduced evidence. Learned counsel for the appellant was not able to show me that the vagueness of the plea in any way prejudiced the decree-holder.

The more serious question that arises will be whether the decree obtained by the decree-holder in Suit no 20 of 1949, could still be executed against the judgment-debtor by his eviction from the Chitra Talkies (Buildings). Sri *Saksena* for the decree-holder appellant contended that this new arrangement amounted to an adjustment of the decree in execution within the meaning of O. XXI, r. 2 of the C. P. C. and the judgment-debtor having failed to have the adjustment recorded as certified by the Court within the time allowed by law, the

court below legally erred in recognising the arrangement set up by the judgment-debtor as a bar to the execution. Sri *Rajeshwar Prasad* for the judgment-debtor respondent in reply submitted that the new contract of tenancy entered into by the parties in July, 1965 by which a fresh tenancy in favour of Durgadas Mehta started from 1st August, 1965 would not, in law, be an adjustment of the decree in execution it being an independent transaction giving rise to new rights quite independent of the decree in execution, therefore, even without having it recorded as certified by the court the judgment-debtor was within his rights to set it up as a bar to the execution. Alternatively it was argued by Sri *Rajeshwar Prasad* that it was always open to the decree-holder to certify such an adjustment at any time before the court and the bar of limitation under Art. 125 of the Schedule to the Limitation Act, 1963 will not apply. The submission was that the two applications filed before the executing court by two partners of the decree-holder was nothing but bringing to the notice of the court that an adjustment had taken place and it amounted to the certificate by the decree-holder within the meaning of sub-r (1) of r. 2 of O. XXI, C P C.

I am inclined to agree with the contention of the learned counsel for the judgment-debtor respondent that the new contract of tenancy entered into between the decree-holder and the judgment-debtor by which a fresh tenancy in the cinema building was created in the latter's favour with effect from 1st August, 1965 was not an adjustment of the decree in execution. My initial reaction was that the provisions of r. 2, O. XXI of the C. P. C. were applicable only to a decree of any kind under which money was payable and the decree in execution in the instant case being one for the delivery of possession, those provisions were not attracted to it. This view of mine found support from a decision of the

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Madras High Court in the case of *Narayanaswami Naidu v. Rangaswami Naidu* (1). But my attention was drawn to the Division Bench decision of our Court in *Sri Ram v. Lekhrao* (2) in which the Madras view was dissented from and it was held that provisions of O. XXI, r. 2 applied to all kinds of decrees and were not confined to money decrees or decrees under which money was payable.

The basic question, therefore, that remains to be considered is whether the creation of a new tenancy in favour of the judgment-debtor was an adjustment of the decree in execution. The decree in execution in the instant case was for delivery of possession by eviction of the judgment-debtor. The process of execution is nothing but an assistance given by the court to the decree-holder varying from case to case depending on the nature of the decree. The judgment-debtor in the instant case in execution through the assistance of the officers of the court was liable to be dispossessed physically. Once the judgment-debtor was dispossessed through the process of the court full satisfaction would be accorded to the decree-holder and the decree will stand fully satisfied. The adjustment contemplated under r. (2) of O. XXI, C. P. C. is the satisfaction of the decree—wholly or in part. As pointed out above under the decree in execution in the instant case satisfaction could only be accorded to the decree-holder by dispossession of the judgment-debtor, that is, his physical removal from the cinema building by the assistance of the officers of the court. If without the assistance of the officers of the court the judgment-debtor vacates either at his own initiative or at the initiative of the decree-holder, then that would amount to according satisfaction to the decree-holder outside the Court, that is, without the assistance of the machinery of the court. It would then be an adjustment within the meaning of r. 2 of O. XXI of the decree

(1) A.I.R. 1926 Mad. 749

(2) A.I.R. 1952 All. 814.

in execution Viewed in this light, I fail to understand how the decree in the instant case can be said to have been adjusted when there has been no vacating of the possession of the cinema building by the judgment-debtor at all and his right to remain in possession is recognised by the decree-holder on the basis of a fresh contract of lease. What the decree-holder in fact has done is saying to the judgment-debtor that "I do not want you to vacate the premises and with effect from 1st August, 1965 I recognise your occupation as a tenant under the contract of lease" In doing so I do not think that the decree-holder could be said to have been intending to accord satisfaction to the decree in execution when under some arrangement arrived at between the decree-holder and the judgment-debtor new rights are created by entering into a fresh contract quite inconsistent with the rights determined under the decree in execution The right which was determined in the decree in execution was that the tenancy had stood legally terminated and the decree-holder as landlord was entitled to the delivery of vacant possession by the judgment-debtor. In the arrangement arrived at between the decree-holder firm and the judgment-debtor in July, 1965 nothing concerned the delivery of possession by the judgment-debtor to the decree-holder but on the other hand a situation to the contrary came into existence, namely, as a lessor the decree-holder was to put in possession the judgment-debtor who had become a new tenant. It does not make any material difference, to my mind, that the judgment-debtor was in occupation from before Under the arrangement between the decree-holder and the judgment-debtor by which a new tenancy was created in favour of the latter, the decree in execution was not being adjusted in the sense as explained by me above On the other hand an arrangement anew between the parties on contractual basis, quite foreign to the rights determined by the decree in execution, was arrived at

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between the parties. I may illustrate my point. A decree for possession is obtained by the owner of a land against a trespasser. The owner puts that decree in execution but pending the execution the owner decree-holder sells the land on which the trespass was committed to the judgment-debtor and a sale-deed is executed and duly registered evidencing the transaction. The decree-holder owner admits to have sold the property. The judgment-debtor does not apply to the court, neither the decree-holder brings it to the notice of the court that a sale of the property in suit had taken place by which the said property stands transferred to the judgment-debtor. The question is—can the owner decree-holder still in execution through the assistance of the court dispossess the judgment-debtor? The obvious answer is in the negative. If such transactions were to amount to adjustment of the decree in execution requiring certification by the executing court, then much difficulty will arise. I do not think the authorities cited by the learned counsel for the decree-holder appellant lay down any such wide proposition of law that in no case a transaction which makes a decree ineffective entered into between the decree-holder and the judgment-debtor can be set up as a bar to the execution unless it has been got certified under r 2 of O XXI, C. P. C. Indeed faced with such a situation in the case of *Sri Ram v Lekhnaj* (1) relied on by the learned counsel for the appellant the learned Judges observed as follows:

“O. XXI, r 2 of the C. P. C. is a counter part of O XXIII, r 3 in the execution proceedings. The provisions of O XXIII, r 3, C P C can be extended to the execution proceedings. It is manifestly unjust that after the parties have arrived at an agreement or the adjustment of a decree and one of them has even performed a part of the agreement

(1) A I R 1952 AH 814.

the Court should not give recognition to such an agreement and allow any party to resile from it."

A similar view was taken by DHAVAN, J in the case of *Bhagwati Mahraj v. Shambhu Nuth* (1) I have no doubt in my mind that the judgment-debtor was entitled to set up a plea under s 47 of the C P C that the new tenancy created in his favour with effect from 1st August, 1965 by the decree-holder rendered the decree inexecutable. The Privy Council in the case of *Oudh Commercial Bank Ltd v Thakuram Bind Basni* (2) has ruled that such objections can be raised under s 47 of the C. P. C.

For the reasons given above I find no force in this appeal and dismiss it with costs

Appeal dismissed.

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*Before Mr Justice Jagmohan Lal**

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PETITIONER,

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U. P. Municipalities Act, 1916 s. 87-A—Powers of District Magistrate under—Exercise of, by an Additional District Magistrate invested with powers of District Magistrate under s 10(2) of the Code—Code of Criminal Procedure, 1898, ss. 10(2) and 11

An Additional District Magistrate who is invested with all the powers of the District Magistrate under s. 10(2) of the Code of Criminal Procedure can validly exercise the powers of the District Magistrate under s 87-A of the Municipalities Act during the temporary absence from duty of the District Magistrate or even in his presence. The holding of temporary charge of

*While sitting at Lucknow

(1) A.I.R. 1960 All. 562

(2) A.I.R. 1939 P.C. 80

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the district by an A. D. M. [not invested with the powers of D. M. under s 10(2) of the Code] during the casual leave of the D. M. does not authorise him to exercise the powers of D. M. under s 87-A. The D. M. does not possess any power to appoint any other officer, during his absence from duty, as a District Magistrate within the meaning of s 10(1) or 10(2) of the Code. Office of the District Magistrate, during such casual leave could not be deemed to be vacant within the meaning of s 11 of the Code. Functions of the District Magistrate under sub-ss. (1), (3) and (4) of s. 87-A of the Act are statutory functions which could not be delegated by the District Magistrate to any other officer who was not otherwise competent to discharge those functions.

—, s. 87-A—*Mode of voting.*

No mode of voting has been prescribed by s. 87-A. It is in the discretion of the Presiding Officer to adopt any reasonable method of counting votes for and against the motion. The method of counting votes by show of hands is one such method.

Writ Petition no 1932 of 1971 under Art 226 of the Constitution of India

Umesh Chandra Srivastava, for Petitioner.

S. D. Misra, for Opposite-parties.

JAGMOHAN LAL, J.:—The Petitioner Shiam Behari Lal is the President of Nagar Palika, Muhamdi in district Kheri. The opposite-parties nos 7 to 15 are some of the members of the said Nagar Palika who constitute a majority of such members. Sri Yogesh Chandra was the District Magistrate of Kheri in November-December, 1971. On November 11, 1971, he had proceeded on casual leave for five days and went to Delhi directing Sri S. L. S. Kumaiyan, A.D.M. (E) to hold charge of the district in his absence and to contact him at his Delhi address in case of emergency. On 12th November, 1971 a written notice of the intention to make a motion of no confidence against the petitioner signed by opposite-parties nos. 7 to 14 was delivered to Sri Kumaiyan under sub-s. (2) of s. 87-A of the U. P. Municipalities Act (hereinafter to be referred to as the Act). Sri Kumaiyan fixed 13th December, 1971 as the date for consideration of this motion of no confidence and requested the District Judge to depute a civil judicial officer to preside at

the said meeting On 1st December, 1971 when the District Magistrate Sri Yogesh Chandra was again out of station another A.D.M. Sri Mohar Singh issued notices by registered post to the members of the Nagar Palika informing them of the meeting and of the date and time appointed, therefore, for consideration of the no-confidence motion against the President as required by sub-s. (3) of the aforesaid s. 87-A. On the stipulated date, time and place a meeting was held which was presided over by the Munsif Kheri (opposite-party no. 6) The motion was carried by a majority of the members of the Nagar Palika. The petitioner then filed this writ petition challenging the validity of the aforesaid meeting on a number of grounds.

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The writ petition was contested on behalf of some of the opposite-parties who filed counter-affidavit. Sri *Umesh Chandra Srivastava* learned counsel for the petitioner challenged the meeting in which the alleged motion of no-confidence was carried on the following grounds:

(1) Neither Sri S. L. S. Kumaiyan nor Sri Mohar Singh was the District Magistrate at the relevant time within the meaning of s. 87-A and as such the decision taken by Sri Kumaiyan under sub-s (3) fixing the date, time and place of the meeting and the request made by him to the District Judge for deputing a stipendiary Civil Judicial Officer to preside at the meeting were without jurisdiction. Similarly, notices sent by registered post on 1st December, 1971 by Sri Mohar Singh to the members were without jurisdiction. The subsequent proceedings culminating in the convening of the said meeting in which the alleged motion of no-confidence was carried were also illegal and without jurisdiction.

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(2) The written notice of intention to make a motion of no-confidence on the petitioner purporting to have been signed by opposite parties nos. 7 to 14 and delivered to Sri S. L. S. Kumaiyan on 12th November, 1971 was not accompanied by a copy of the motion which it was proposed to make as required by sub-s. (2) of s. 87-A and as such the subsequent proceedings initiated on the basis of this written notice are vitiated.

(3) The notices issued by Sri Mohar Singh were not accompanied by a copy of the proposed motion of no confidence and as such the notices were invalid.

(4) When the meeting was convened on 13th December, 1971 and presided over by the Munsif, Kheri, the motion for the consideration of which the meeting was convened was not declared open for discussion and no discussion was actually held on this motion as contemplated by sub-ss. (7), (8) and (9).

(5) The Presiding Officer did not take the poll by secret ballot paper but only by show of hands and it was not valid.

I shall deal with these points *seriatim*

Sri Umesh Chandra Srivastava, learned counsel for the petitioner, contended that the expression 'District Magistrate' used in s. 87-A of the Act means only a District Magistrate appointed by the State Government under s. 10(1) of the Code of Criminal Procedure (to be hereinafter called as the Code). According to him even an Additional District Magistrate appointed by the State Government under sub-s. (2) of s. 10 of the Code who had been invested with all the powers of a District Magistrate under the Code or any other law for the time being in force cannot be deemed to be a District Magistrate within the meaning of s. 87-A of the Act. On the

other hand, Sri S. D. Misra, learned counsel for the opposite-parties, submitted that the expression 'District Magistrate' used in s. 87-A should be liberally construed so as to include any officer who for the time being is the chief executive officer in the district and is in charge of the administration of the district, irrespective of the fact whether or not he has been appointed by the State Government as District Magistrate under sub-s. (1) or even an Additional District Magistrate invested with all the powers of the District Magistrate under sub-s. (2) of s. 10 of the Code. In my opinion, none of these two extreme views is correct.

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The expression 'District Magistrate' has not been defined in the Act or in the U. P. General Clauses Act. It may, therefore, be legitimately inferred that the framers of the Act had the provisions of s. 10 of the Code in their mind when they used the expression 'District Magistrate' in s. 87-A and other sections of the Act and that expression has, therefore, to be construed in the light of the provisions contained in s. 10 of the Code. In *State of Uttar Pradesh v. Ratan Shukla* (1) it was held by a Bench of this Court that the words 'District Magistrate' which had not been defined in the U. P. Municipalities Act or in the U. P. General Clauses Act had to be construed in the light of the provisions contained in s. 10 of the Code. It was further held that an Additional District Magistrate appointed by the State Government under s. 10(2) of the Code who had been invested with all the powers of a District Magistrate under the Code or under any other law for the time being in force could hear appeals under s. 160 of the Act which provides that an appeal against certain orders relating to assessment of tax may be made to the District Magistrate or to such other officer as may be empowered by the State Government in this behalf.

(1) A.I.R. 1956 All. 258.

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The expression 'District Magistrate' was used in the Defence of India Act, 1962, also without defining it therein. The Supreme Court in *Azab Singh v. Gurbachan Singh* (1) and *Hari Chand v. Batula Eng. Co.* (2) had also to take recourse to the provisions of s. 10 of the Code for interpreting this expression 'District Magistrate' used in the Defence of India Act.

On the strength of the aforesaid two decisions of the Supreme Court the learned counsel for the petitioner contended that the expression 'District Magistrate' used in s. 87-A should be construed to mean only the District Magistrate as appointed under s. 10(1) of the Code and not also to mean an Additional District Magistrate appointed and empowered under s. 10(2). These decisions of the Supreme Court relate only to the interpretation of the expression 'District Magistrate' under the Defence of India Act and the orders made thereunder and have no application to the interpretation of this expression as used in s. 87-A of the Act. In the Defence of India Act, 1962 no statutory functions were assigned to the District Magistrate as such. Cl. (xv) of sub-s. (2) of s. 3 of that Act empowered the Central Government to make by notification in the official *Gazette* rules providing for apprehension and detention in custody of any person by the authority empowered by the rules to do so. It was, however, specifically provided therein that such authority empowered to detain is not to be lower in rank than that of a District Magistrate. The Defence of India Rules conferred this power of detention on the Central Government and the State Government who were authorised to delegate the same under s. 40 of Defence of India Act to any officer or authority subordinate to the Central Government or the State Government. The power of detention was accordingly delegated by the State of Punjab to all the District

(1) A.I.R. 1965 S.C. 1619.

(2) A.I.R. 1969 S.C. 488.

Magistrates In *Ajaib Singh v. Gurbachan Singh* (1) an Additional District Magistrate empowered by the State Government under s. 10(2) of the Code to exercise all the powers of the District Magistrate was holding the current charge of the duties of the District Magistrate on his transfer from that district till another District Magistrate was appointed under s. 10(1) of the Code. But that officer himself was not appointed under s. 10(1) as District Magistrate. He exercised the power of detention which was challenged on behalf of the detenu. It was held by their Lordships of the Supreme Court that he could not do so because in official hierarchy an Additional District Magistrate was lower in rank than a District Magistrate. The power to detain person could not be exercised by an officer who was lower in rank than a District Magistrate in view of the provisions contained in s. 3(2) (xv) of the Defence of India Act. In *Hari Chand v. Batala Eng. Co.* (2) it appeared that the Central Government under s. 40(1) of the Defence of India Act had delegated powers under ss. 29, 30 and some other sections of that Act on all Collectors, District Magistrate and Deputy Commissioners in the States. The question arose whether an Additional District Magistrate who was empowered under s. 10(2) of the Code could also exercise these powers which had been delegated by the Central Government to the District Magistrates. The Supreme Court held that the delegation had to be construed strictly and the delegated power could be exercised only by the District Magistrates and not by the Additional District Magistrate even though the latter may be empowered under s. 10(2) to exercise all the powers of the District Magistrate under any other law for the time being in force. Thus both these cases related to the delegated powers of the District Magistrate and not to the powers assigned to him under any statute for the time being in force.

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(1) A.I.R. 1965 S.C. 1619.

(2) A.I.R. 1969 S.C. 481.

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Another case relied upon by the petitioner's counsel was *Chandra Pal v. State of U. P.* (1). In this case an Additional District Magistrate appointed under s. 10(2) of the Code granted sanction for prosecution under s. 39 of the Arms Act, 1959 which conferred this power on the District Magistrate. The expression 'District Magistrate' had not been defined in the Act but in the rules it was provided that the expression 'District Magistrate' shall include Additional District Magistrate also. It was held that the rules could not enlarge the scope of the expression 'District Magistrate' used in the Act which shall be construed in the light of the provisions contained in s. 10 of the Code. Since it was not proved as a fact in that case that the Additional District Magistrate who granted this sanction under s. 39 of the Arms Act had been empowered under s. 10(2) of the Code to exercise the powers of the District Magistrate under the Arms Act, it was held that the sanction was invalid. In my opinion, this decision is also not an authority for the contention that an Additional District Magistrate empowered under s. 10(2) of the Code to exercise all the powers of a District Magistrate cannot be deemed to be a District Magistrate for the purposes of s. 87-A of the Act. On the contrary it was specifically held in *State of Uttar Pradesh v. Ratan Shukla* (2) that an Additional District Magistrate empowered under s. 10(2) of the Code can act as a District Magistrate in hearing appeals under s. 160 of the Act. In *Central Talkies Ltd. v. Dwarka Prasad* (3) it was held by the Supreme Court that an Additional District Magistrate who had been appointed as such by a notification under s. 19(2) of the Code whereunder he was also invested with all the powers of the District Magistrate under the Code as well as under any other law for the time being in force, was competent to deal with an application under s. 3 of the

(1) 1968 A.L.J. 481.

(2) A.I.R. 1956 All. 258.

(3) A.I.R. 1961 S.C. 606.

U. P. (Temporary) Control of Rent and Eviction Act for permission to file a civil suit without special authorisation from the District Magistrate. I am, therefore, of the opinion that an Additional District Magistrate who is invested with all the powers of the District Magistrate under s. 10(2) of the Code can validly exercise the powers of District Magistrate under s. 87-A of the Act during the temporary absence from duty of the District Magistrate or even in his presence. This is a different matter that for the sake of administrative convenience the District Magistrate may demarcate in what matters the Additional District Magistrate shall exercise his powers and in what matters he will personally exercise those powers. But as a matter of law if an Additional District Magistrate exercises any power of the District Magistrate under the Act while the District Magistrate himself is available for duty it would not be without jurisdiction.

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We have now to look into the facts to find out if on 12th November, 1971 Sri S. L. S. Kumaiyan was an Additional District Magistrate who was invested with all the powers of the District Magistrate under the Code or under any other law for the time being in force. He was admittedly not a District Magistrate appointed under s. 19(1) of the Act on that date or on any other relevant date.

It appears that Sri Kumaiyan who was under orders of transfer to Sitapur was under an order, dated July 7, 1971 passed by the State Government (vide Annexure A-5 to the supplementary counter-affidavit) appointed as Additional District Magistrate, Kheri after cancelling his transfer to Sitapur. This order does not contain any direction that Sri Kumaiyan as Additional District Magistrate shall have all or any of the powers of the District Magistrate under the Code or under any other

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law for the time being in force. As such on the basis of this appointment Sri Kumaiyan as Additional District Magistrate, Kheri could not exercise the powers of District Magistrate under s 87-A of the Act. The opposite parties however rely on a subsequent order, dated 18th January, 1972 (Annexure A-4 to the supplementary counter-affidavit) passed by the State Government during the pendency of the present writ petition under which Sri Kumaiyan was invested under s. 10(2) of the Code with all the powers of District Magistrate under the Code or under any other law for the time being in force for the period from 18th July, 1971 to 30th November, 1971 during which he remained posted in Kheri District. It may be mentioned that after 30th November, 1971 Sri Kumaiyan was transferred from Kheri.

On behalf of the petitioner it is contended that this order, dated 18th January, 1972 passed during the pendency of the writ petition is a *mala fide* order which was passed only to remove the lacuna in the performance of his functions by Sri Kumaiyan under s. 87-A on 12th November, 1971 when he had no authority to act under this section. Besides that, this order, dated 18th January, 1972 is invalid so far as it could not retrospectively confer these powers on Sri Kumaiyan. In support of this contention reliance is placed on the decisions in *M. S. U. Mills v Industrial Tribunal, Jaipur* (1), *Kapoorchand v. State of Rajasthan* (2) and *Strawboard Manufacturing Co. v. G. Mill Workers' Union* (3). The argument on the other side is that Sri Kumaiyan had originally been appointed as Additional District Magistrate, Kheri under the order, dated 7th July, 1971 (Annexure A-5 to the supplementary counter-affidavit) but this order was incomplete in so far as it did not contain directions regarding the powers of the District

(1) A.I.R. 1954 Raj 274.

(2) A.I.R. 1962 Raj 258

(3) A.I.R. 1953 S.C. 95.

Magistrate which shall be exercised by Sri Kumaiyan as Additional District Magistrate under the Code or under any other law for the time being in force. That deficiency was made good by this subsequent notification, dated 18th January, 1972 and it was permissible for the State Government to do so under s. 10(2) of the Code read with s. 14 of the U. P. General Clauses Act. This argument does not appear sound in view of the above mentioned decisions. In *Strawboard Manufacturing Co. v. G. Mill Workers' Union* (1) a dispute under the U. P. Industrial Act, 1947 was referred to an adjudicator who was required to submit his award by a specified date. But he failed to do so within that time and he submitted his award after the expiry of that date. The time for submission of the award was not extended by the State Government before the expiry of that date. But subsequently the State Government purported to extend that time. This order was dated 26th April, 1950 while the last date fixed by the Government for submitting the award was 5th April, 1950. The award was actually submitted on 13th April, 1950. Under the notification, dated 26th April, 1950 the time for submission of the award was extended up to 30th April, 1950. It was held by the Supreme Court that this retrospective extension of time was not permissible by application of s. 14 of the U. P. General Clauses Act and the award made after the expiry of the original date fixed at the time of reference was invalid. In *M. S. U Mills v. Industrial Tribunal* (2) an officer was appointed as Presiding Officer of an Industrial Tribunal up to 31st March, 1954. A dispute under the Industrial Disputes Act was referred to him. That dispute could not be decided by him till 31st March, 1954 up to which date his appointment had been made. His appointment was not further extended before that date. But he con-

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(1) A.I.R. 1953 S.C. 95,

(2) A.I.R. 1954 Raj 271

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tinued to adjudicate in the dispute. Subsequently under a notification, dated 26th May, 1954 the State Government of Rajasthan purported to extend the period of appointment of that officer retrospectively with effect from 1st April, 1954. It was held that the period could not be extended retrospectively and the notification would be valid only from the date of its issue. As such the proceedings before the Tribunal presided over by that officer from 1st April, 1954 to the date of this notification were without jurisdiction. The same view was held in the subsequent Rajasthan case *Kapoorchand v. State of Rajasthan* (1). I am in respectful agreement with the principles laid down by the Rajasthan High Court in these cases. The notification, dated 18th January, 1972 cannot, therefore, validly confer powers of the District Magistrate on Sri Kumaiyan, Additional District Magistrate retrospectively for the period from 18th July, 1971 to 30th November, 1971. Sri Kumaiyan as Additional District Magistrate was not competent on 12th November, 1971 to entertain the notice of the intention to make no confidence motion against the petitioner, to take a decision by fixing the date, time and venue of the meeting for this purpose and request the District Judge to depute a civil judicial officer for presiding over that meeting.

On behalf of the opposite-parties it was contended that Sri Kumaiyan was holding the charge of the district on 12th November, 1971 under an order dated 10th November, 1971 passed by Sri Yogesh Chandra, District Magistrate, vide Annexure A-1 to the supplementary counter-affidavit. This order reads as follows:

"I shall (be) on casual leave on November 11 to 15, 1971 as I have to go to Delhi. My address in Delhi shall be 11 Tyag Raj Marg, New Delhi and Telephone no. 372781. In the event of any emergency I can be contacted on this address,

(1) A.I.R. 1962 Raj. 258.

During my absence Sri S L S. Kumaiyan,
A.D M (E) shall hold charge of the District "

Sri S D. Misra, learned counsel for the opposite-parties, relied on a decision of this Court in *Shiv Dayal v State of U. P.* (1) in which it was held that an officer who succeeds temporarily to the chief executive administration of a district and who is able to exercise all the powers and perform all the duties conferred and imposed by the Code of Criminal Procedure on a District Magistrate is a District Magistrate for the purposes of s. 87-A. In that case one Sri C. M. L. Bhatnagar who was already posted as Additional District Magistrate, Jhansi and had been invested under s. 10(2) of the Code with all the powers of the District Magistrate under the Code as well as under any other law for the time being in force, was appointed by the State Government as an officiating District Magistrate under s. 10(1) of the Code on the transfer of the permanent District Magistrate. During this period when Sri Bhatnagar was officiating as District Magistrate he exercised all the powers of the District Magistrate under s. 87-A. The objection raised in that case was that since Sri Bhatnagar was only an officiating District Magistrate he could not be deemed to be a District Magistrate within the meaning of s. 87-A. This objection was rightly, if I may say so with all respects, repelled by the Bench. Obviously, the distinction between an officiating and permanent District Magistrate is only for the purposes of conditions of service and service rules. So far as statutory functions are concerned an officiating District Magistrate is as much competent to exercise those functions as a permanent District Magistrate. In my opinion as indicated above even an Additional District Magistrate fully empowered under s. 10(2) of the Code without his being appointed under s. 10(1) of the Code as an officiating District Magistrate in the absence of the District Magistrate could exercise

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(1) A.I.R. 1968 All. 664.

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these powers. That ruling does not obviously help the opposite-parties.

The holding of temporary charge of the district by Sri Kumaiyan during the casual leave of Sri Yogesh Chandra does not authorise him to exercise the powers of the District Magistrate under s. 87-A. The District Magistrate does not possess any power to appoint any other officer, during his absence from duty, as a District Magistrate within the meaning of s. 10(1) of the Code or an Additional District Magistrate within the meaning of s. 10(2) of the Code. All that this order, dated 10th November, 1971 means is that during the absence of Sri Yogesh Chandra, District Magistrate, Sri Kumaiyan would remain in charge of the current duties of the office and if there was any emergency he could take necessary instructions from the District Magistrate himself who had given his address in this order. As held in *Emperor v. Achhaibar Singh* (1) an officer on casual leave is not treated as absent from duty. As such on 12th November, 1971 the office of the District Magistrate, Kheri could not be deemed to be vacant within the meaning of s. 11 of the Code. Even if a different view is taken on this matter, under s. 11 the officer so succeeding temporarily to the chief executive administration of the district in consequence of the office of the District Magistrate becoming vacant could exercise only the powers of the District Magistrate under the Code and not under any other law for the time being in force.

The learned counsel for the opposite-parties then contended that the receiving of a notice of intention to make no confidence motion under sub-s. (1), fixing up the date and time of the meeting under sub-s. (3) and arranging with the District Judge for a stipendiary Civil Judicial Officer to preside over the meeting under sub-s. (4) of s. 87-A are all routine matters which can be exercised

(1) A.I.R. 1921 Oudh 162

on behalf of the District Magistrate by any other officer irrespective of the fact whether he himself was an empowered Additional District Magistrate or not, who was holding current charge of the district for the time being. This contention of the learned counsel for the opposite-parties cannot be accepted. In my opinion the above functions of the District Magistrate are statutory functions provided by the provisions of subss (2), (3) and (4) which could not be delegated by the District Magistrate to any other officer who was not otherwise competent to discharge those functions. A similar view was held by a learned Judge of this Court in *Kishore Goswami v District Magistrate* (1). It was held in this case that s. 87-A (3) of the Act requires that the date and time of the meeting have to be appointed by the District Magistrate and the manner of publication of notice has also to be determined by him, and that these matters cannot be left by him to any other authority. If the District Magistrate has not applied his mind and taken a decision on these matters, there is a clear breach of the provisions of s. 87-A (3). I accordingly hold that the acts performed by Sri S. L. S. Kumaiyan on 12th November, 1971 in relation to the no-confidence motion against the petitioner were without jurisdiction and the subsequent proceedings in consequence of those acts are also vitiated. In this view of the matter it is not necessary to consider whether Sri Mohar Singh who issued notices to the members on 1st December, 1971 was also competent to exercise the powers of the District Magistrate or not on that date. It may, however be stated that so far as Sri Mohar Singh is concerned he was duly appointed as Additional District Magistrate with all the powers of the District Magistrate under the Code and under any other law

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for the time being in force under a notification, dated 9th July, 1971 of which a copy is on the record. So there appears no flaw in exercise of the powers of District Magistrate by Sri Mohar Singh under s. 87-A of the Act on 1st December, 1971 though these subsequent acts are also vitiated, as held above, in view of the earlier acts of Sri Kumaiyan being without jurisdiction.

It is next contended on behalf of the petitioner that the written notice of intention to move a motion of no confidence on the petitioner was not accompanied by a copy of the motion which it was proposed to make as required by sub-s. (2) of s. 87-A. The document that was delivered to Sri S. L. S. Kumaiyan on 12th November, 1971 by the opposite-parties nos. 7 to 14 reads as follows:

"SUBJECT—Notice for no-confidence motion against Sri Shyam Behari Lal President, M. B. Mohamdi

SIR,

There is a strength of 15 members in Municipal Board Mohamdi, and we are the following members who are in majority, have lost our confidence in Shri Shyam Behari Lal President of M. B. Mohamdi

It is, therefore, requested to please make necessary arrangements, in this connection, as we want to pass motion of no-confidence against Shri Shyam Behari Lal President of Municipal Board, Mohamdi, at an early date.

Yours faithfully,

We are "

On behalf of the opposite-parties it has been contended that it is a composite document which contains a writ-

ten notice of the intention to move a no-confidence as well as the next of the proposed motion of no-confidence. If paragraph I had not been incorporated in this document and it had consisted of only the second paragraph it could be argued that it was only a notice of intention to move a no-confidence motion. But the language of the first paragraph shows that the persons who signed that document who were opposite-parties nos 7 to 14 had unequivocally expressed that they formed the majority of the members of the Municipal Board, Mohamdi which consisted of fifteen members and that they had lost their confidence in the petitioner as President of the Board. It thus contains the next or at least the substance of the proposed motion. In my opinion it is a substantial compliance of the provisions contained in sub-s. (2) of s. 87A.-

A copy of the notice that was issued by Sri Mohar Singh A. D. M. on 1st December, 1971 under sub-s. (3) is available on the record vide Annexure 1 to the writ petition. This notice gives a clear indication to the members about the date, time and the place of the meeting which was to be convened for consideration of the motion of no-confidence against the President under the presidentship of Sri S. K. Srivastava, Munsif, Kheri. In my opinion, this is a sufficient compliance of the requirements of sub-s (3) which does not in terms lay down that the notice should be accompanied by a copy of the motion proposed to be moved at the meeting or by a copy of the written notice of intention received from the majority of the members. The same view was held by a Bench of this Court in *Abdul Wajid v State of U. P.* (1) which decided the special appeal against the judgment of a learned Single Judge in *Molvi Abdul Wajid v State of U. P.* (2). It

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(1) AIR 1955 ALL 708

(2) AIR 1955 NUC 1718

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was held that in a case of no-confidence motion against the President, law does not require that full text of the motion should be sent along with the notice. It is enough that the substance of the motion is made known to the members in the notice circulated to them for the meeting to be held to consider the same. So this objection raised on behalf of the petitioner is without any merit

The next objection of the petitioner that the motion for consideration of which the meeting was convened was not declared open for discussion and no discussion was actually held on this motion, does not appear correct. From the record of the proceedings prepared by the Munsif Kheri who presided over the meeting it is clear that the motion was read out to the members but none of them wanted to speak on it. The time-limit for discussion contained in sub-s (9) is the maximum time for which the discussion can continue. It does not, however, lay down that the voting should necessarily be held up for three hours even though none of the members wanted to enter in any discussion on the motion

The last objection raised on behalf of the petitioner is that the Presiding Officer did not take poll but allowed the members to vote by show of hands. No mode of voting has been prescribed by s. 87-A. It may be pointed out that s. 43 provides that election of the President shall be by secret ballot. If it was intended that the voting on a motion of no confidence under s. 87-A should also be by a secret ballot, such a provision would have been made in that section. In the absence of any such provision it was in the discretion of the Presiding Officer to adopt any reasonable method of counting votes for and against the motion. The method of counting votes by show

of hands is one such method. It has been repeatedly held by this Court in various decisions that it cannot be said that the right to demand a poll has become a common law in India as regards the law of meetings. It is not, therefore, necessary to insist upon a poll in every case and the matter may well be left to the discretion of the Presiding Officer. Reference may be made to *L. N Shukla v. State of U. P.* (1), *L. S. Khare v State of U. P* (2) and *Molvi Abdul Wajid v State of U. P.* (3). The record of the proceedings prepared by the Presiding Officer does not show that any objection was taken to open voting by show of hands. The allegation to the contrary contained in the petition is denied in the counter-affidavit filed by Sri *B. R Misra* on behalf of opposite-parties nos. 1 to 4. This objection is therefore without any merit.

The writ petition is allowed. The proceedings originating by a written notice of the intention to move a no-confidence motion against the petitioner handed over by opposite-parties nos. 7 to 14 to Sri S. L. S. Kumaiyan on 12th November, 1971 and culminating in the motion of no-confidence being passed in the meeting convened on 13th December, 1971 under an order passed by the said Sri S. L. S. Kumaiyan, are quashed. But in the circumstances of the case and having regard to the fact that the petitioner failed on several other points, the parties shall bear their own costs.

Petition allowed.

(1) 1959 A L J 858.

(2) 1957 A L J 416.

(3) A.I.R. 1955 N.U.C. 1718

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CIVIL MISCELLANEOUS

Before Mr Justice J. S. Trivedi.

RAM DULAREY

... Petitioner.

1972

May, 10

UNION OF INDIA AND OTHERS *Opposite-parties.*

Railway Servants (Discipline and Appeal) Rules, 1968, R. 10(5) (1) (a)—*Compliance of—Finding of Inquiring Authority—Reasons when necessary by Disciplinary Authority.*

Under r 10 the reasons are necessary if the Disciplinary Authority disagrees with any findings of the Inquiring Authority but in case where the Disciplinary Authority agrees with the Inquiring Authority a statement to the effect that it agrees with the findings of the Inquiring Authority is sufficient compliance of r. 10(5) (a).

Union of India v. K. Rajappa Menon (1) relied on.

Lajpat Rai Malhotra v. Financial Advisor and Chief Accounts Officer, Northern Railway (2) and *Union of India v. Sashi Bhushan Biswas* (3) distinguished.

— Schedule 11 nos. 7, 8 and 9—*Show-cause notice—Issue of—Authority competent to—Constitution of India Art. 311 (2).*

The Disciplinary Authority defined in the rules is entitled to institute disciplinary proceedings only. Under Art. 311(2), Constitution of India as well the authority to show-cause cannot be different from the authority that is competent to impose the punishment.

Writ Petition No 920 of 1970 under Art 226 of the Constitution of India.

B. C. Saxena for the petitioner.

N. Banerji, for the opposite-party no 2.

TRIVEDI, J.—Disciplinary proceedings were taken against the petitioner while he was holding the post of Assistant Permanent Way Inspector North-Eastern Railway. Charge-sheet under the signature of Assistant Engineer (West), Lucknow with the designation of disciplinary authority was given to him. Annexure 1

(1) A.I.R. 1970 S.C. 748.

(2) 1970 A.L.J. 1095.

(3) A.I.R. 1970 Cal. 545

*While sitting at Lucknow.

to the writ petition is the true copy of the memorandum accompanying the charge-sheet. A detailed explanation to the charges denying the allegations was made by the petitioner. The petitioner also claimed a personal hearing. The Divisional Engineer appointed Assistant Engineer (East) Lucknow Junction as the Inquiring Officer. The Inquiring Officer submitted his report on February 16th, 1970. A show-cause notice Annexure 7 to the affidavit was then given by the Divisional Engineer proposing the punishment of removal from service. The petitioner has come to this Court under Art. 226 of the Constitution of India for quashing the aforesaid show-cause notice. On the ground that (1) the punishment authority has not given its independent finding on each charge and the show-cause notice, therefore, violates sub-cl. 5 of r. 10 of the Railway Servants (Discipline and Appeal) Rules, 1968 (hereinafter referred to as the Rules), and (2) the appointing authority of the petitioner was Chief Engineer, Gorakhpur and the show-cause notice by the Divisional Engineer is bad on that account. The opposite-party has contested the claim and has contended that the show-cause notice does not violate r. 10 of the Rules. It is further contended that the rules envisage two distinct authorities—appointing authority and the disciplinary authority and the procedure and the action up to the stage of show-cause notice under the rules can be taken by the disciplinary authority. His contention is that the final order of dismissal or removal only is envisaged by the appointing authority who will be the dismissing authority. R. 6 enumerates the penalties and removal from service is described as major penalty at item (viii). Sub-cl. (2) to r. 8 authorises the disciplinary authority to initiate proceedings against any railway servant for the imposition of any of the major penalties specified in cls. (v) to (ix) of sub-r. (1)

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or r. 6 notwithstanding that such disciplinary authority is not competent to impose the said penalties. R. 9 prescribes the procedure for imposing major penalties. R. 10, sub-cl. (5) (1) (a) reads as under:

"If the disciplinary authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in cls. (v) to (ix) of sub-r. (1) of r. 6 should be imposed on the railway servant, it shall—

(a) furnish to the railway servant a copy of the report of the inquiry held by it and its findings on each article of charge, or, where the inquiry has been held by an inquiring authority, appointed by it, a copy of the report of such authority and a statement of its findings on each article of charge together with brief reasons for its disagreement, if any, with the findings of the inquiring authority."

The show-cause notice, Annexure 7 given to the petitioner is as under—

"Shri Ram Dularey, A. P. W. I./Aishbagh, son of Shri Jagdeo is informed that the Officer appointed to enquire into article of charges framed against him has submitted his report. A copy of the report of the enquiry officer is enclosed.

On a careful consideration of the report and in particular of the conclusion reached in respect of the articles of charges framed against Shri Ram Dularey, A. P. W. I./Aishbagh, son of Shri Jagdeo, the undersigned agrees with the findings of the Inquiry Officer and holds that the article of charges is proved. The undersigned has, therefore, provisionally come to the conclusion that Shri Ram Dularey, A. P. W. I./Aishbagh, son of Shri Jagdeo is not a fit person to be retained in

service and that he should be removed from service of A. P. W. I. Shri Ram Dularey, A. P. W. I. son of Shri Jagdeo is hereby given an opportunity of showing cause against the action proposed to be taken. Any representation which he may make in that connection will be considered by the undersigned. Such representation, if any, should be made in writing which must be based only on the evidence adduced during the enquiry and submitted so as to reach the undersigned not later than"

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The show-cause notice is signed by Sri M. S. A. Rao, Divisional Engineer, N. E. Railway, Lucknow as Disciplinary Authority.

Learned counsel for the petitioner contends that the show-cause notice is bad because it lacks any statement of the findings of the Disciplinary Authority. According to him it was obligatory on the Disciplinary Authority to give its own independent finding and the expression that he agrees with the finding of the Inquiring Officer is not sufficient compliance of r 10(5) (1) (a). Before October, 1968, the railway employees were governed by the Discipline and Appeal Rules for Railway Servants and the language of r. 10 was similar to para 1713 of those rules. Reliance has been placed by the petitioner in support of its contention on *Lajpat Rai Malhotra v. Financial Advisor and Chief Accounts Officer Northern Railway* (1) where it was laid down that r. 1713 is mandatory and contains very salutary principle and is not meant to be mere ceremony. The facts of that case, however, were that the punishing authority did not at all apply its mind to the matter and dittoed the finding of the Enquiry Committee. There was no indication even in the show-

(1) 1970 A.L.J. 1095.

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cause notice issued in that case that the authority issuing show-cause notice had agreed with the finding of the Inquiring Officer. The facts of that case are, therefore, distinguishable from the facts of the present case. *Union of India v. Sashi Bhushan Biswas* (1) was also a case where the findings of the Inquiring Officer were not examined by the punishing authority and in that context it was laid down that—

“R. 1713 is mandatory. It goes beyond the requirements of Art 311 (2) of the Constitution and requires the punishing authority to apply his mind to the materials on the record over again even where he may agree with the findings of the Inquiry Officer. Where the punishing authority does not examine the findings of the Inquiry Officer upon which the employee was found guilty and does not record his own findings separately on the charges, his order gets vitiated for non-compliance with r. 1713.”

There can be no dispute that the Disciplinary Authority before issuing a show-cause notice has to apply its mind to the findings of the Inquiring Officer. In *Union of India v. K Rajappa Menon* (2) while considering the language of R. 1713 it was laid down by their Lordships of the Supreme Court that—

“R. 1713 does not lay down any particular form or manner in which the disciplinary authority should record its finding on each charge. All that the Rule requires is that the record of the enquiry should be considered and the disciplinary authority should proceed to give its findings on each charge. This does not and cannot mean that it is obligatory on the disciplinary authority to discuss the evidence and the facts and circum-

(1) A.I.R. 1970 Cal. 545.

(2) A.I.R. 1970 S.C. 748.

tances established at the departmental enquiry in details and write as if it were an order or a judgment of a judicial tribunal.

Where the disciplinary authority after giving consideration to the record of the proceedings of the departmental inquiry agreed with the findings of the Enquiry Officer that all the charges mentioned in the charge-sheet had been established, it meant that he was affirming the findings on each charge and that fulfils the requirement of the Rule. The Rule after all has to be read not in a pendent manner but in a practical and reasonable way."

The relevant portion in the show-cause notice which was before their Lordships of the Supreme Court was in these words—

"I agree with the findings of the Inquiring Officer that all the charges mentioned in the charge-sheet had been established."

Under r. 10 the reasons are necessary if the disciplinary authority disagrees with any findings of the Inquiring Authority but in a case where the disciplinary authority agrees with the Inquiring Authority a statement to the effect that it agrees with the findings of the Inquiring Authority is sufficient compliance of r 10(5)(a). The contention of the petitioner, therefore, that the show-cause notice was bad for non-compliance of r. 10(5)(a) has no force.

The next contention of the learned counsel for the petitioner that the show-cause notice was not given by an authority competent to dismiss or remove the petitioner has force. Sch. II to the Rules describes the various authorities competent to take disciplinary action in respect of non-gazetted staff. Under serial

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nos. 7, 8 and 9 which deal with the removal of service, compulsory retirement and dismissal from service, the authority to inflict such type of punishment is shown as appointing authority or any other higher authority. Mr. *Banerji*, learned counsel for the opposite-parties has contended that while the appointing authority may be competent to pass an order of removal, the notice to show-cause could be issued by the disciplinary authority. I am unable to accept this submission of the learned counsel for the opposite-parties. The purpose of the show-cause notice is that the punishing authority after examining the findings of the Inquiring Officer has to decide the gravity of the charge and the quantum of the punishment. The quantum of punishment on the facts and findings of each case has to depend on the satisfaction and opinion of the punishing authority. The disciplinary authority defined in the rules is entitled to institute disciplinary proceedings. Only under Art. 311(2), Constitution of India as well the authority to show-cause notice cannot be different from the authority that is competent to impose the punishment. In the instant case Annexure 10 to the affidavit is the copy of the order of appointment, and Chief Engineer, Gorakhpur happens to be the appointing authority. The Divisional Engineer was, therefore, not competent and had no jurisdiction to issue a show-cause notice against the petitioner.

The order is not challenged on any other ground.

For the reasons given above this writ petition has to be allowed and is accordingly allowed with costs. The show-cause notice dated 27th April, 1970 Annexure 7 to the affidavit is quashed.

Petition allowed.

CIVIL REVISION (F. B.)

Before Mr. Justice Dwivedi, Mr. Justice S. Chandra,
Mr. Justice R. L. Gulati, Mr. Justice H. Swarup,
Mr. Justice H. N. Seth, Mr. Justice Gopi Nath and
Mr. Justice K. N. Seth.

1972

May, 18.

MAHABIR PRASAD

... APPLICANT,

v.

PEER BUX AND OTHERS

RESPONDENTS.

Stamp Act, 1889, s. 2(5)(a) Sch. I-B, Art. 15—Agreement or a Bond—Document representing an agreement to sell—No promise to pay back the advance money—Document unattested—Not a bond, but an agreement.

Where the document read as a whole represents a transaction of an agreement to sell a commodity and an advance payment of its price; one of the terms of the transaction being that in default of supplying the agreed quantity the executant will pay damages at a certain rate and there was no express promise to pay back the advance price in case of default and the document was not attested; *held*; that such a document would be chargeable to stamp duty as an agreement and not as a bond.

Reference by the Board of Revenue N. W. P. under Act I of 1879 (1) overruled.

Civil Revision No. 684 of 1969 against the order of J. S. Srivastava, Insolvency Judge, Moradabad, dated 12th February, 1969.

S. P. Gupta, for the Applicant.

Krishna Sahai, for the Respondent.

S. CHANDRA, J.:—This seven Judge Full Bench has been constituted to consider the five Judge Full Bench decision of this Court in I. L. R. 2 Allahabad, 654 (*Reference by the Board of Revenue, N. W. P.*)

Mohabir Prasad, the applicant, made an application under s. 9, Provincial Insolvency Act, for declaration of Peer Bux, Opposite-party no. 1, as an insolvent. It

(1) I.L.R. 2 All. 654.

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was alleged that Peer Bux had borrowed a sum of Rs. 4,000 from the applicant on January 17, 1967. He had agreed to supply 50 quintals of Rab at Rs.80 per quintal in lieu of the borrowed sum. It was also agreed that in case of default Peer Bux would pay to the applicant the amount of profits at 50 per cent by way of damages. The transaction was evidenced by a deed of agreement and a receipt both dated January 17, 1967. Peer Bux did not supply the Rab as agreed and a sum of Rs. 4,000 was due from him. He had committed an act of insolvency by transferring his property.

On the deed of agreement, dated January 17, 1967, being produced in Court, Peer Bux filed an objection stating that the document was a bond and was inadmissible in evidence for lack of sufficient stamp duty. The learned Insolvency Judge upheld the objection. According to him the document was a bond. The applicant was directed to make good the deficiency in stamp duty and to pay the prescribed penalty. Aggrieved, the applicant came to this Court in revision.

At the hearing of the revision reliance was placed upon a 5 Judge Full Bench of this Court in *Reference by the Board of Revenue, N. W. P.* (1) in support of the view taken by the learned Insolvency Judge. On behalf of the applicant it was urged that this Full Bench decision has been doubted in a number of subsequent decisions of this as well as other High Courts. The learned single Judge hearing the revision felt that it was desirable that the question be considered by a larger Bench. His opinion was endorsed by a Division Bench.

The document in question states that Peer Bux promises to sell 50 quintals of Rab at the rate of Rs. 80

(1) I.L.R. 2 All. 654

per quintal to L. Mahabir Prasad. He has received Rs. 4,000 as an advance towards the price. He agrees that he will supply the Rab by March, 1967. In case of default in making the supply, he will pay 50 per cent of the profits by way of damages. The document was unattested.

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Read as a whole the document represents a transaction of an agreement to sell Rab and an advance payment of its price. One of the terms of the transaction was that in default of supplying the agreed quantity of Rab the executant will pay damages at the rate of 50 per cent of the profits. In the document there is no express promise to pay back the sum of Rs. 4,000 which he had received as the advance price, in case the Rab was not supplied.

The question is whether this document is a bond or merely an agreement, within meaning of the Stamp Act.

S 2(5) of the Stamp Act defines a 'bond' to include—

“(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.”

The document before us is unattested. So it is outside the purview of cls. (b) and (c) Cl. (a) requires an obligation to pay money subject to the condition that the obligation shall be void if a specified act is performed or is not performed. The transaction ought

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to relate to so conditioned an obligation. The primary or the principal covenant ought to be to create an obligation to pay money defeasible on the happening of the specified event. Cl. (a) will not be applicable to a transaction where the obligation to pay money arises as a consequence of the commission of a breach of some other obligation. This clause will not apply where the obligation accrues on the non-performance of some stated act, because on the language of cl. (a), on the non-performance of the specified act the obligation to pay money is to become void, not become enforceable. The sequence of events stipulated in cl. (a) cannot be reversed in order to bring an instrument within its purview.

In the present case the obligation to pay money (in the form of 50 per cent of profits) was to arise if Peer Bux defaulted in supplying the agreed quantity of Rab. The agreement between the parties was that he will supply the Rab. In default he shall be obliged to pay money. The term providing for the consequence of default was not the principal covenant between the parties. It was a penalty clause which came into operation if the principal obligation was violated. The intention of the parties was not that if the Rab was supplied the obligation to pay money would as its consequence become void; in that event the obligation would not accrue or arise at all.

A 'bond' defined in s. 2(5) of the Stamp Act is assessable to duty under Art. 15 of Sch. I-B of the Act. Under it the prescribed stamp duty is on a graduated scale depending upon the amount or value secured. Where the amount or value secured does not exceed Rs. 10 the stamp duty is 35 naye paise. The duty increases with every slab of the amount or value secured

by the bond, the last slab being for every Rs. 500 or part thereof in excess of Rs 1,000 the duty is Rs.11 25 Read in the light of Art. 15 the definition of 'bond' in s 2(5) must mean an obligation to pay an ascertained sum of money. The phrase "a person obliges himself to pay money to another" ought to refer to an obligation to pay a stated or ascertained sum of money. The obligation in the present case was to pay 50 per cent of the profits. When the bond was executed no fixed amount of money could be said to have been agreed as payable. In this view also the instrument in question could not be chargeable to duty as a bond under Art. 15.

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Art. 15 applies to a bond as defined in s. 2(5) and, *inter alia*, not otherwise being provided for by the Act. Art 34 provides for an indemnity bond. For it the stamp duty payable is the same as on a security bond under Art. 57. Art. 57 provides for a security bond executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or executed by a surety to secure the due performance of a contract or the due discharge of a liability Obviously, it refers to a transaction where the principal engagement is of the kind mentioned in this article. That apart, the mode of calculating the proper stamp duty is, under cl. (a); when the amount secured does not exceed Rs.1,000 the duty is assessable as in the case of a bond under Art 15, for the amount secured. Cl. (b) provides for "any other case" and for it, there is a fixed stamp duty. Thus a document of the nature of a security bond is assessable to a fixed duty, where the amount or the value secured is not ascertained. Art. 15, however, does not provide for a bond where the amount or value secured is not ascertained.

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The obligation to pay money in the present case is contained in the penalty clause which comes into operation on breach of the principal covenant to supply the Rab. To such a penalty clause s. 74 of the Contract Act is applicable. S. 74 provides—

“When a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

NIAMATULLAH, J in *Mohiuddin v. Mst. Kashmiri* (1) held—

“Parties to every contract containing a stipulation by way of penalty have rights and are subject to obligations mentioned in s. 74, which are part and parcel of every such contract which should be deemed to include a proviso, imported by s. 74, to the effect that the party complaining of the breach is entitled to reasonable compensation not exceeding the penalty but is not entitled to enforce the penalty stipulated for in the contract.”

In law the contract in the present case will be deemed to be that on Peer Bux not supplying the agreed quantity of Rab the applicant was entitled to reasonable compensation not exceeding the stated amount, namely not exceeding 50 per cent of the profits. So construed the transaction between the parties provided to the applicant a remedy by way of suing for compensation for breach of contract. In the case of a bond, the

remedy is to recover the sum named in the bond. If the bond is conditioned on the performance of some covenant, the person recovers the actual damage which he could prove that he has sustained. The point is that in either case, as GARTH, C. J. put it in *Gisborne and Co. v. Subal Bowri* (1), "not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different." This is corroborated by the provisions of the Limitation Act Cl. (d) of s. 2 of the Limitation Act, 1963, gives the definition of 'bond' in terms identical with cl. (a), s. 2(5) of the Stamp Act. Art. 27 provides for a suit for compensation for breach of a promise to do anything within a specified time. The prescribed period of three years begins to run where the time specified arrives. Arts. 28 and 29 provide for a suit on a simple bond depending upon whether a day is specified for payment or not. The time of three years begins to run on the day so specified or the date of executing the bond. The position is the same under the Limitation Act, 1908. It will be seen that the cause of action for a suit on a bond accrues on an occasion different than the cause of action for a suit for compensation for breach of a promise. This also tends to show that the obligation to pay money as penalty for breach of a covenant is not within the purview of the definition of 'bond' in cl. (a) of s. 2(5). In my opinion the document before us was not a bond within meaning of s 2(5)(a). It was chargeable to duty as an agreement.

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For the opposite-party reliance was placed upon the Full Bench decision of this Court in *Reference by the*

(1) I.L.R. 8 Cal. 284 (286).

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Board of Revenue, N. W. P., under Act 1 of 1879 (1). In that case by the sixth clause of the instrument one party to the instrument bound itself in the event of any breach on the part of that party in the observation or performance of any of the conditions of the instrument, to pay the other party thereto a penalty of Rs. 5,000 OLDFIELD, J. (PEARSON, SPANKIE and STRAIGHT, JJ. concurring) observed—

“No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp duty as an agreement under Sch. I, no 5(c).”

The learned Judge then held—

“I agree with the Board that the words in the definition of bond in the Act ‘on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be,’ refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause 6, however, meets the requirements of the definition of ‘bond’, the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of s. 7 of the Act.”

OLDFIELD, J. construed the definition of 'bond' as if its provisions could be read inversely. 'That course, in my opinion, is not legitimate. It is true that the performance or non-performance of the specified act is incumbent upon the obligor, but the accrual of the obligation to pay money should precede the performance or non-performance of the specified act. Upon the performance or non-performance of the specified act the obligation should become void. In the case of a penalty clause the position is just the reverse. In my opinion, the majority view does not, with respect, lay down the law correctly. STUART, C. J. in his minority opinion held that the sixth clause was not a bond but an agreement.

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The ratio of the majority opinion in this case was doubted by another Full Bench of this Court in *the matter of Gajraj Singh* (1) and also in *Sunder Lal v. Thakur Gandharp Singh* (2). The Calcutta High Court in the case of *Gisborne & Co.* (3), differed from the majority opinion and agreed with the minority view of STUART, C. J. The Madras, Rangoon and Nagpur High Courts [*Madras Railway Co v. Rust* (4), *Yeo Eng Pwa v. Chetti Firms* (5), *Collector of Rangoon v. Maung Aung Ba* (6), *Collector of Nimar v. Lakhmichandsa* (7)] have also disagreed with the majority view expressed in I.L.R. 2 Allahabad 654. In my view, the consensus of opinion in the country lays down the correct law.

I would hold that the document in question before us was not chargeable to duty as a bond but as a simple agreement.

(1) I.L.R. 9 All. 585.

(3) I.L.R. 8 Cal. 284

(5) 4 I.C. 293

(2) I.L.R. 12 Luck. 181

(4) I.L.R. 14 Mad. 18.

(6) 33 I.C. 920

(7) A.I.R. 1927 Nag. 72.

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In the result, the revision succeeds and is allowed with costs. The order of the learned Insolvency Judge dated February 12, 1969 is set aside and it is directed that duty and penalty is assessable on the document in question on the basis that it was a simple agreement.

Revision Allowed.

CIVIL MISCELLANEOUS

Before Mr Justice R. S. Pathak

1972
January, 25.

UNION OF INDIA

PETITIONER,

v.

B K. OJHA AND ANOTHER

RESPONDENTS.

Indian Railways Act, 1890, ss. 82-A and 82-J and Railway Accident Compensation Rules, r. 6—Power of Claims Commissioner to award compensation for personal injury

Where the Claims Commissioner found that the claimants had suffered pain and suffering because of the injuries received on account of railway accident he had powers conferred upon him by the Statute and the Rules to award compensation

Railway Accident—Loss of cash—Compensation payable

If it can be established that the loss of currency notes was due to railway accident, clearly compensation is payable.

Civil Miscellaneous Writ Petition no. 1645 of 1970 connected with Writ Petition no. 1194 of 1970.

Lal Ji Srnha, for the Petitioner

R. S. PATHAK, J.:—This and the connected writ petition have been filed by the Union of India against the order of the Claims Commissioner in compensation proceedings under the Indian Railway Act.

In Writ Petition no. 1645 of 1970 the facts are these—On the night between June 20 and 21, 1969 the 6-Down Allahabad—Gorakhpur Express met with an accident resulting in the death of some persons and injuries to others. A Claims Commissioner was appointed by the Central Government under s. 82-B of the Indian Railways Act. The first respondent, B. K. Ojha, made an application for compensation under s. 82-C of the Act claiming that he was one of the injured persons and alleging that in consequence of the accident he had

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received bodily injuries and that he had to be treated in the hospital for a number of days. The application was opposed by the petitioner. On 23rd February, 1970 the Claims Commissioner made an order holding that the claimant had proved that he had suffered serious injury and great pain and suffering, including mental suffering, on which account he was entitled to Rs. 3,000 as compensation, that he had also suffered a loss of goods and cash for which he was entitled to compensation in the sum of Rs.1,000 and he had been on medical leave from 21st June, 1969 to 18th August, 1969 which resulted in loss of salary for which the compensation should be Rs.765. Accordingly, he awarded Rs. 4,765 as compensation.

In Writ Petition no. 1194 of 1970, which arises out of proceedings in respect of the same railway accident, the first respondent Mool Chand, filed an application for compensation alleging that he was one of the injured persons and that besides bodily injuries he had suffered loss of cash and goods. This claim was also opposed by the petitioner. The Claims Commissioner made an order, dated 5th January, 1970 awarding Rs.3,000 on account of pain and suffering brought about by the claimant's injury and loss of earnings, a sum of Rs.5,000 as compensation for loss of cash and a sum of Rs.180 on account of loss of goods.

Learned counsel for the petitioner has raised two contentions. One contention is that there was no jurisdiction in the Claims Commissioner to award compensation for pain and suffering and loss of salary or earnings, and the other is that the loss of cash and goods cannot be immediately or directly attributed to the railway accident.

S. 82-A of the Act provides for compensation payable by the railway administration in the event of a railway accident:

"for loss occasioned by the death of a passenger dying as a result of such accident, and for personal

injury and loss, destruction or deterioration of animals or goods owned by the passenger and accompanying the passenger in his compartment or on the train, sustained as a result of such accident."

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S. 82-J empowers the Central Government to make rules, and sub-s (2) contemplates that the rules may provide for "the nature of the injury for which and the rates at which compensation shall be payable". The Railway Accident Compensation Rules have been framed under s. 82-J, and r. 6 thereof provides:

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"6. *Amount of Compensation*—(1) The amount of compensation payable in respect of death or for injuries causing partial disablement or total disablement shall be at the rates set out in the schedule.

(2) In case of a partial disablement arising out of an injury not specified in Part II of the Schedule such percentage of the compensation payable in the case or a total disablement as is proportionate to the loss of earning capacity permanently caused by the injury, shall be payable.

(3) The amount of compensation payable in respect of injuries causing temporary disablement, total or partial, or of injuries resulting in pain and suffering without causing any disablement, shall be such as the Claims Commissioner may, in all the circumstances of the case, determine to be reasonable:

Provided that such compensation shall in no case exceed 3/5th of the amount prescribed for total disablement in Part I of the Schedule:

Provided that where more than one injury is caused by the same accident compensation shall be payable in respect of each injury but so that the aggregate amount of compensation does not exceed

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the amount which would have been payable if a total disablement had resulted from such injuries:

Provided further that where compensation has been paid for any injury which is less than the amount which would have been payable as compensation if the injured person had died and that person subsequently died as a result of the injuries, a further compensation equal to the difference between the amount payable and that already paid shall become payable."

R. 7 provides—

"Compensation for loss of goods and animals—
Compensation for loss, destruction or deterioration of goods or animals shall be paid to such extent as the Commissioner in the circumstances deems reasonable, provided that such compensation together with any compensation payable for personal injury shall not, in respect of any one person exceed the limit specified in sub-s (2) of s. 82-A."

The first question is whether the Claims Commissioner had power to grant compensation for pain and suffering. R. 6 provides for the compensation payable in respect of death, injuries causing total disablement or partial disablement, and injuries resulting in pain and suffering without causing any disablement. It is clear that if the claimant suffers injuries which result in pain and suffering he is entitled to compensation. That is covered by r. 6(3). It is also covered by s. 82-A which speaks of compensation for personal injury. When the Claims Commissioner found that the claimants in the present cases had suffered pain and suffering because of the injuries received on account of railway accident and awarded compensation therefor, he did no more than exercise the powers conferred upon him by the statute and the rules. The contention of the petitioner to the contrary is rejected.

The next contention is that the claimants were not entitled to compensation on account of the cash lost by them. It is said that the loss of cash cannot be attributed to the railway accident. I have been referred to *Secretary of State v. Gokul Chand* (1). The learned Judges held in that case that loss of currency notes could not be regarded as a pecuniary loss to the estate of the deceased under s. 2 of the Indian Fatal Accidents Act, 1855 because the loss was only remotely connected with the wrongful act and the injury caused by it. It seems to me that the decision has no application. That Act was enacted in order to provide compensation to families for loss occasioned by the death of a person caused by an actionable wrong. The actionable wrong contemplated by that Act is not necessarily identifiable with the subject-matter of s. 82-A of the Indian Railways Act. S. 82-A speaks of railway accident by collision between trains in all cases, whether or not there has been any wrongful act, neglect or default on the part of the railway administration. The wrongful act, neglect or default on the part of the railway administration is not the "*raison D'être*" for the payment of the compensation. It is the railway accident which produces the death or injury for which compensation becomes payable. The railway accident may be due to any reason whatsoever. It may be due to a wrongful act, neglect or default on the part of the railway administration. It may be due to entirely fortuitous circumstances. It is the railway accident which is the immediate cause of the injury, and if it can be established, as it has been found in the present case, that the loss of currency notes was due to the railway accident, clearly compensation is payable. The second contention of the petitioner also fails.

No other point has been pressed before me.

The writ petitions fail and are dismissed with costs.

Writ Petitions dismissed.

(1) A I R. 1925 Lahore 636.

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CIVIL MISCELLANEOUS (F. B.)

Before Mr. Justice G. C. Mathur, Mr. Justice A. K.

Kirby and Mr. Justice H. N. Seth

1972
March, 9.

TRIAMBAK PATI TRIPATHI . . . PETITIONER,
v.

BOARD OF HIGH SCHOOL AND
INTERMEDIATE EDUCATION ... RESPONDENT.

Natural Justice—Essential principles—Quasi-judicial principles to be observed by the Authority—Can evolve its own rules—The essential principles of natural justice that one to be observed by an authority dealing with the cases in quasi-judicial manner are as follows:

(1) The person whose rights are to be affected must be given notice of the case or the charges which he has to meet; (2) he must be given an opportunity to make a representation and to explain the allegation made against him and to have his say in the matter; and (3) the authority conducting the proceedings must not be biased and should act in good faith.

The first two principles imply that the person proceeded against must be informed about the material on the basis of which allegations made against him are founded so that he may have an opportunity of explaining them and putting forward and substantiating his own version. It is open to the authority concerned to evolve its own procedure for acquainting the person concerned with charges and material on which they are founded and also for affording him an opportunity of explaining those charges and putting forward his case. The procedure will vary with the facts, circumstances and nature of the case, constitution of authority dealing with it and the rules under which it functions.

Intermediate Examination Act, 1921—Examination Committee is not required to give personal hearing to candidates—Spot Enquiry Committee obtaining explanation is an ample opportunity—Copy of report need not be given to candidate.

Neither the Intermediate Education Act nor the Rules and Regulation framed thereunder require the Examination Committee to give personal hearing to the candidate. There is no statutory requirement of personal hearing. Personal hearing is not one of the necessary requirements of principle of natural justice.

—, 1921, Board's Calender, Chap VI, para 2(1)—*Punishment under—No opportunity given to show-cause against proposed punishment—No violation of Rules of natural justice,*

Rules of natural justice do not require, as do the provisions of Art 311 of the Constitution, the giving an opportunity to show-cause against the proposed punishment, they merely require the affording of an opportunity to explain or meet the charges or allegation levelled against the person concerned

Prabhat Kumar v Board of High School and Intermediate Education, U. P (1) over-ruled

Civil Miscellaneous Writ no 504 of 1972.

S R. Misra, for the Petitioner

S. C., for the Opposite-party.

H. N. SETH, J.:—The petitioner Triambak Patil Tripathi was a candidate for the High School Examination of the Board of High School and Intermediate Education, U. P. (hereinafter referred to as the Board) held in the year 1971. He appeared in that examination as a regular student of Belpur Higher Secondary School from the Higher Secondary School Kemptiarganj Centre. On receipt of a complaint that there was mass copying at that Centre, the examiners concerned were alerted and were required to evaluate the answer books carefully and to report if there was any indication of use of unfair means by the candidates appearing at that Centre. The examiner of Science second paper reported that he suspected use of unfair means by a number of candidates in answering question no. 2 of that paper. The report of the examiner was endorsed also by the Head Examiner concerned. Thereupon the Examinations Committee of the Board got the answer-books of the candidates appearing at that centre examined by a Screening Committee consisting of experts in the subject. Members of the Screening Committee examined the answer books of various candidates and reported that the petitioner along with other candidates was suspected to have used unfair means in answering not only question no. 2 of the Science second paper but also in answering question no. 1 of the Science first paper. The Examinations Committee then withheld the result of the petitioner and other candidates suspected of using unfair means

(1) 1971 A.L.J. 1891.

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and resolved that an 'On the Spot-Enquiry Sub-Committee' be set up to enquire into the matter in detail and to submit its report before the Examinations Committee. It also framed charge-sheets mentioning the material which indicated the use of unfair means by the petitioner and other candidates. Copies of the two charge-sheets given to the petitioner have been filed as Annexures 'A' and 'B' to the counter affidavit filed on behalf of the respondent Board. These charge-sheets further required the petitioner and others to explain why proceedings under r. 2(1) of Chap. VI of the Board's calendar be not taken against them.

The Spot-Enquiry Sub-Committee visited petitioner's centre on August 28, 1971, and handed over the two charge-sheets prepared by the Examinations Committee to him. Members of the Spot-Enquiry Committee explained the allegations to the petitioner and showed him the answer-books of other candidates about which reference had been made in one of the charge-sheets. The petitioner gave his explanation in respect of the allegations in the charge-sheets and then subscribed his signatures to a declaration that he had given his explanation voluntarily and after fully understanding the matter, that the relevant answer-books had been shown to him and that he had nothing further to say in the matter. The Spot-Enquiry Sub-Committee submitted its report to the Examinations Committee which after examining the answer-books, the charge-sheets of the candidate, the explanation given by him and the report of the Spot-Enquiry Sub-Committee, resolved, *vide* its resolution no. 178, dated October 6, 1971, that the High School Examination result of the petitioner for the year 1971 be cancelled, and he be also debarred from the Board's Examination for the year 1972. The resolution passed by the Examinations Committee was duly approved by the Chairman of the Board. This decision was com-

municated to the petitioner through the Principal of the institution concerned.

On receipt of this communication, the petitioner filed the present writ petition before this Court contending that there was no material before the Examinations Committee for finding him guilty of having used unfair means at the examination, and that its decision was based merely on surmises and conjectures. He pleaded that the procedure adopted by the Examinations Committee and the Sub-Committee for punishing the petitioner violated the principles of natural justice and as such the order passed by the Examinations Committee cancelling his examination and debarring him from appearing at the Board's 1972 Examination deserved to be quashed. He also complained that in the matter of punishment he has been improperly discriminated as against one other candidate, *viz.* Jai Ram Pandey, a student of the same institution who was caught red-handed using unfair means. In his case the Examinations Committee merely cancelled his 1971 examination.

When this petition was taken up for preliminary hearing, learned counsel for the petitioner relied on certain observations made by a Division Bench of this Court in the case of *Prabhat Kumar v. Board of High School and Intermediate Education, U. P.* (1) in support of his contention that it was incumbent upon the Examinations Committee to itself afford the petitioner an opportunity of being heard both in regard to the conclusions recorded by the Sub-Committee as also the punishment proposed to be awarded and that if this was not done the principles of natural justice were violated and the order punishing the petitioner deserved to be quashed. The Bench hearing the petition felt that these observations made in *Prabhat Kumar's* case required reconsideration and, therefore, referred the case for decision by a Full Bench. This is how the case has come up for decision before us.

(1) 1971 A.L.J. p. 1891.

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In the case of *Board of High School and Intermediate Education, U. P. v. Ghansham Das Gupta* (1), it has been held that the Examinations Committee while dealing with the cases of examinees using unfair means in examination hall acts quasi-judicially and the principles of natural justice apply to the proceedings before it. The question that, therefore, arises for consideration is whether the procedure adopted by the Examinations Committee violated the principle of natural justice.

Learned counsel for the petitioner urged that in this case the procedure adopted by the Examinations Committee violated the principles of natural justice inasmuch as—

(1) The Examinations Committee obtained the explanation of the petitioner through a sub-committee appointed by it instead of itself requiring the petitioner to explain the allegations made against him.

(2) While considering the case against the petitioner, the Examinations Committee took into consideration the report made by the Spot Enquiry Sub-Committee without bringing it to his notice and without affording him an opportunity to explain it.

(3) The Spot Enquiry Sub-Committee did not afford adequate opportunity to the petitioner to explain his case and he was not given an opportunity to show cause against the proposed punishment.

In order to test the validity of the aforesaid contentions, we have to determine the precise scope and ambit of the applicability of the principles of natural justice in such cases.

In *Russel v. Duke of Norfolk* (2), TUCKER, L. J. observed—

“The requirements of natural justice must depend on the circumstances of the case, the nature

(1) A.I.R. 1964 S.C. 1110.

(2) 1949 (1) All E.R. 109 at p. 118.

of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case"

Similarly, in *Local Government Board v. Aldridge* (1),
VISCOUNT HALDANE, L. C., observed—

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case But it does not follow that the procedure of every such tribunal must be the same But what that procedure is to be in detail must depend on the nature of the tribunal I agree with the view expressed in an analogous case by my noble and learned friend Lord LOREBURN. In *Board of Education v. Rice* (2), he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial"

Again in the case of *Byrne v. Kinematograph Renters Society Ltd.* (3), Lord HARMAN, observed—

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an

(1) 1915 A.C. p. 120.

(2) 1911 A.C. 179.

(3) (1958) 2 A.E.R. 579.

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were examined in his presence and he was allowed to cross-examine them and lastly, he was given every opportunity to present his case before the Inquiry Officer. Hence we see no merit in the contention that there was any breach of the principles of natural justice."

A consideration of these authorities leads us to the conclusion that the essential principles of natural justice that are to be observed by an authority dealing with the case in quasi-judicial manner are as follows:

(1) The person whose rights are to be affected must be given notice of the case or the charges which he has to meet;

(2) He must be given an opportunity to make a representation and to explain the allegations made against him and to have his say in the matter; and

(3) The authority conducting the proceedings must not be biased and should act in good faith.

In our opinion the first two principles necessarily imply that the person proceeded against must be informed about the material on the basis of which the allegations made against him are founded so that he may have an opportunity of explaining them and putting forward and substantiating his own version. Rules of natural justice not being embodied rules, it is open to the authority concerned to evolve its own procedure for acquainting the person concerned with the charges and the material on which they are founded, and also for affording him an opportunity of explaining those charges and putting forward his case. The procedure will necessarily vary with the facts, circumstances and nature of the case, constitution of the authority dealing with it and the rules under which it functions.

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opportunity to state his case, and thirdly, of course, that the tribunal should act in good faith, I do not think that there really is anything more."

In the case of *Board of High School v. Ghanshyam Das* (1), while dealing with the scope of applicability of principles of natural justice in proceedings before an authority which is required to act in a quasi-judicial manner, learned Judges of the Supreme Court in para 12 of the judgment observed as follows:

"As to the manner in which it should give an opportunity to the examinee concerned to be heard, that is a matter which can be provided by Regulations or Bye-laws if necessary. As was pointed out in *Local Government Board v. Aldridge* (2), *all that is required is that the other party should have an opportunity of adequately presenting his case.* But what the procedure should be in detail will depend on the nature of the tribunal. There is no doubt that many of the powers of the Committee under Chap. VI are of administrative nature; but where quasi-judicial duties are entrusted to an administrative body like this it becomes a quasi-judicial body for performing these duties and it can prescribe its own procedure so long as the principles of natural justice are followed and adequate opportunity of presenting his case is given to the examinee."

In the case of *Suresh Koshy v. University of Kerala* (3) it was observed as follows:

"Suffice it to say that in the case before us there was a fair inquiry against the appellant, the officer appointed to enquire was an impartial person; he cannot be said to have been biased against the appellant; the charge against the appellant was made known to him before the commencement of the enquiry; the witnesses who gave evidence against him

(1) A.I.R. 1962 S.C. 1110.

(2) 1915 A.C. 120.

(3) A.I.R. 1969 S.C. 198 at p 202.

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Let us now examine the complaint of the petitioner regarding the violation of principles of natural justice in this case. His first complaint is that the Examinations Committee obtained his explanation through a sub-committee instead of itself requiring him to explain the allegations made against him. In order to substantiate this complaint, learned counsel for the petitioner relied on decision of a Division Bench of this Court in the case of *Prabhat Kumar v. Board of High School and Intermediate Education, U. P.* (1) In that case, the result of Prabhat Kumar, who appeared in the High School Examination of the Board in the year 1970, was cancelled after following a procedure similar to that followed in this case. A Division Bench of this Court relied upon the following passage appearing in the judgment of the Supreme Court in the case of *Gullapalli Nageshwar Rao v. A. P. State Road Transport Corporation* (2):

“This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the argument and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We, therefore, hold that the said procedure followed in this case also offends another basic principle of judicial procedure.”

and observed as follows:

“In our opinion the procedure followed in the case before us is exactly what has been condemned

(1) 1971 A.L.J. 1391.

(2) A.I.R. 1959 S.C. 308.

by the Supreme Court in the above case and what in substance amounts to contravention of rules of natural justice. The purpose of appointment of the Sub-Committee under bye-law 46 appears to be to enable that Committee to make an on the spot enquiry into cases of use of unfair means in the Board's examination and to examine in detail matters which required careful scrutiny but cannot be disposed of in the meeting of the Board or its Committee. After on the spot enquiry or enquiry into individual cases in the manner the Sub-Committee may consider appropriate the conclusions recorded by it are no more than tentative because final authority is the Examinations Committee which may accept recommendation in whole or in part or may reject it altogether. Further, bye-law 46 does not appear to contemplate that the Sub-Committee shall make recommendation to the Board about the *quantum* of punishment which may be awarded. But assuming that it may do so; the authority which has to decide upon the appropriate punishment and to award the same is the Examinations Committee. Keeping this in view it appears manifest that, whereas it was no doubt fit and proper that the petitioner be allowed to appear at the Sub-Committee enquiring into the matter and defend himself, it was incumbent on the Examinations Committee to afford the petitioner an opportunity of being heard both in regard to the conclusion recorded by the Sub-Committee and also punishment to be awarded. There is no controversy that this was not done in the present case and we have no doubt that the impugned order of the Board whereby the examination of the petitioner has been annulled and he has been debarred from appearing at the 1971 Examination must be quashed."

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In *Nageshwar Rao's* case (1) the Supreme Court had to consider whether the objections filed by the transport operators against a scheme prepared and published under s. 68-C of the Motor Vehicles Act had been properly disposed of. Rules framed under the Motor Vehicles Act required that the State Government shall decide the matter after giving a personal hearing to the objectors. In this case personal hearing was given by a Secretary to Government and the Minister passed the order approving the Scheme. This procedure was condemned by the Supreme Court in these words:

"This divided responsibility is destructive of the concept of judicial hearing."

It must be remembered that these words were spoken in respect of the statutory right of personal hearing conferred by the rules and not in respect of any right of hearing flowing from the principles of natural justice. The Supreme Court explained its observation made in *Nageshwar Rao's* case (1) in a subsequent case, *General Manager Eastern Railways v. Jwala Prasad Singh* (2) by making the following observation:

"The observation of this Court in *Gullapalli Nageshwar Rao's* case (1) have no bearing on the facts of the present case. There it was held that a personal hearing was given by a Secretary of a Department and the Minister of the State was to decide things put up by the Secretary, the procedure defeats the object of personal hearing. The observation at page 357 that 'personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of arguments and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and

(1) A.I.R. 1959 S.C. 308.

(2) A.I.R. 1970 S.C. 1095.

another decides then personal hearing becomes an empty formality' can have no application to the facts of the case before us. 'The members of the Enquiry Committee who heard the arguments had the entire record before them and they had to go by the record.'

This passage makes it abundantly clear that the decision in *Nageshwar Rao's* case (1) was in respect of the requirement of personal hearing. In the case before us neither the Intermediate Education Act nor the Rules and Regulations framed thereunder require the Examinations Committee to give a personal hearing to the candidate. There is thus no statutory requirement of personal hearing.

It was contended by the learned counsel for the petitioner that the principles of natural justice required the Examinations Committee to give a personal hearing to the candidate against whom action was proposed to be taken and, therefore, the decision of the Supreme Court in *Nageshwar Rao's* case (1) is fully applicable to an enquiry which is made by the Examinations Committee. We do not think that personal hearing is one of the necessary requirements of principles of natural justice.

In the case of *State of Assam v Gauhati Municipal Board, Gauhati* (2) while dealing with the case under s. 298 of the Assam Municipalities Act, the Supreme Court observed as follows

"Therefore, where a provision like s. 298 is fully complied with as in this case and the Board does not ask for an opportunity for personal hearing or for production of materials in support of its explanation, principles of natural justice do not require that the State Government should ask the

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(1) A.I.R. 1959 S.C. 808.

(2) A.I.R. 1967 S.C. 1398.

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Board to appear for a personal hearing and to produce materials in support of the explanation. In the absence of any demand by the Board of the nature indicated above, *we cannot agree with the High Court that merely because the State Government did not call upon the Board to appear for a personal hearing and to produce material in support of its explanation it violated the principles of natural justice.*

Again in the case of *Union of India v. Jyoti Prakash* (1) learned Judges of the Supreme Court observed as follows:

"Art. 217(3) does not guarantee a right of personal hearing. Nor is a personal hearing a necessary incident of rules of natural justice. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. *A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation.* He, however, cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President while making an enquiry is not a court and the giving of personal hearing is entirely discretionary."

There is thus neither any statutory requirement, nor any requirement of principles of natural justice which compels the Examinations Committee to give a personal hearing to the candidate. That being so, the principle laid down by the Supreme Court in *Nageshwar Rao's case* (2) cannot be applied to the enquiry by the Examinations Committee. The Examinations Committee was entitled to evolve a procedure for informing

(1) A.I.R. 1971 S.C. p. 1098.

(2) A.I.R. 1959 S.C. 308.

a candidate of the charges levelled against him and about the material proposed to be used and for giving him an opportunity of explanation through the Spot-Enquiry Sub-Committee. With respect we are unable to agree with the conclusions arrived at by the learned Judges in *Prabhat Kumar's* case (1) on the basis of the decision of the Supreme Court in *Nageshwar Rao's* case (2) the first complaint of the petitioner based on *Prabhat Kumar's* case (1) must, therefore, be rejected.

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Second complaint of the petitioner is that the report of the Spot-Enquiry Sub-Committee was not given to him and the Examinations Committee used the material without disclosing it to him. In doing this, the Examinations Committee violated the principles of natural justice. We have already set out earlier the principles of natural justice and in our opinion they do not require the furnishing of a copy of the report to the candidate. A similar question arose before the Supreme Court in the case of *Suresh Koshy v. University of Kerala* (3). In that case Suresh Koshy, a student of the Kerala University, was suspected of having used unfair means in answering the mathematics first paper. Vice-Chancellor of the University ordered a formal enquiry and appointed a retired Principal as the Enquiry Officer. Suresh Koshy appeared before the Enquiry Officer. Subsequently, the Enquiry Officer submitted a report to the Vice-Chancellor holding Suresh Koshy guilty of mal-practice during the examination in question. On the basis of that report the Vice-Chancellor issued a show-cause notice to Suresh Koshy. It was contended that the rules of natural justice were violated inasmuch as Suresh Koshy was not supplied a copy of the Enquiry Officer's report before obtaining his explanation. The Supreme Court repelled this contention and held that there was no violation of any principle of natural justice merely because

(1) 1971 A.L.J. p. 1891.

(2) A.I.R. 1959 S.C. 308.

(3) A.I.R. 1969 S.C. p. 108

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the report of the Enquiry Officer was not brought to the notice of the examinee concerned before obtaining his explanation.

Learned counsel for the petitioner placed strong reliance on the case of *Suresh Kumar v. Punjab University* (1). In this case during disciplinary proceedings against Suresh Kumar the matter was enquired into by the Assistant Registrar, Punjab University. During enquiry proceedings the Assistant Registrar after perusing the report of the Head Examiner in the English paper and the statement of the petitioner, referred the matter to an expert for his considered opinion. This report was adverse to Suresh Kumar who was never informed about it. Relying upon the expert opinion, the Standing Committee punished the examinee. The Punjab High Court held that, in the circumstances, the order passed, relying upon the expert opinion, could not be upheld. It appears that in this case the Standing Committee relied upon the opinion of the expert as a piece of evidence indicating that the petitioner was guilty of using unfair means in the examination. It was not merely the report submitted by a fact finding body but the opinion given by an expert that was relied upon as material evidence. The question whether it was necessary to supply to the candidate concerned a copy of the Enquiry Officer's report was not at all involved in the case. At the instance of the petitioner we had the report of the Spot-Enquiry Sub-Committee produced before us and we have perused the same. This report indicates that the Spot-Enquiry Sub-Committee interviewed a large number of candidates who were suspected of using unfair means in Board's Examination. For the facility of the Examinations Committee, this report was prepared in a tabular form indicating the allegations made against each candidate, the material on the basis of which those

(1) A.I.R. 1966 Pun. 154.

allegations were made and the explanation given by the candidate. The material mentioned in the report was the same which had been disclosed to the candidate concerned. No doubt the report further contained the opinion of the Sub-Committee about the plausibility of the explanation given by the petitioner, but there was no other material, referred to in the report, indicating that the petitioner had used unfair means in the examination which had not been brought to his notice before obtaining his explanation. The opinion expressed by the Sub-Committee about credibility of the explanation given by various candidates certainly was no material which could have indicated that the petitioner had used unfair means. The Examinations Committee was to decide the matter on its own after looking into the charges, the explanation given by the petitioner and the relevant answer-books. In our opinion, it was not necessary for the Examinations Committee to disclose this report to the candidate and the petitioner's second complaint has no substance.

Coming now to petitioner's third complaint, namely that the Spot-Enquiry Sub-Committee did not afford an adequate opportunity to the petitioner to explain his case and he was not given an opportunity to show-cause against the proposed punishment, we find that in this case the Examination Committee got all the material, which led to an inference that the petitioner had used unfair means in answering the two questions brought to the notice of the petitioner by means of a charge-sheet given to him through the Spot-Enquiry Sub-Committee. The petitioner was provided an opportunity to explain the allegations. He gave whatever explanation he thought proper and made a declaration that he had nothing further to say in the matter. In the charge-sheet his attention had been invited to the fact that the material that was being brought to his notice indicated that he

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was guilty of using unfair means and that he was required to show-cause why action under para. (1) of Chap. VI of the Board's Calendar be not taken against him. The petitioner gave his explanation and said that he had nothing further to say in the matter. It will thus be seen that the procedure adopted gave ample opportunity to the petitioner to explain the allegations made against him and to show-cause against the punishment which could be meted out to him under para. 2(1) of Chap. VI of Board's Calendar. Rules of natural justice do not require, as do the provisions of Art. 311 of the Constitution, the giving of an opportunity to show-cause against the proposed punishment; they merely require the affording of an opportunity to explain or meet the charges or allegations levelled against the person concerned. But in the present case the petitioner was given even an opportunity to have his say with regard to the punishment. The charge-sheets required him to show-cause why action should not be taken against him under para. 2(1) of Chap. VI, which prescribes the punishments for those found using unfair means at examinations. The petitioner thereby got full opportunity to say whatever he liked in respect of the punishment in case the charges levelled against him were made out.

It was next contended that in this case the Spot-Enquiry Sub-Committee compelled the petitioner to give his answers to the question contained in the charge-sheet in a very short time without affording him an opportunity of thinking over the matter. The petitioner, therefore, was not given an adequate opportunity to explain his case and the ultimate order cancelling his result cannot be upheld. This contention is not supported by any averment made in the writ petition. Moreover, Annexures A and B filed along with the counter-affidavit show that the petitioner was given full opportunity to have his say in the matter. Towards the end of these

documents the petitioner has subscribed a declaration to the effect that he gave his explanation voluntarily and after fully understanding everything and that he had nothing further to state in the matter. It is, therefore, not possible to accept the petitioner's contention that the Spot-Enquiry Sub-Committee did not afford him adequate opportunity to explain his case. In our opinion there is no substance even in petitioner's third complaint about the breach of principles of natural justice

Learned counsel for the petitioner next contended that there was no material before the Committee for coming to the conclusion that the petitioner had used unfair means at the examinations and that the finding of the Examinations Committee was based merely on surmises and conjectures. It has been pointed out in the case of *Board of High School and Intermediate Education v. Bagleshwar Prasad* (1) that in the matter of adoption of unfair means direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. In dealing with the validity of the orders passed by such authorities the High Court does not sit in appeal over the decision of the authority concerned. Its jurisdiction is limited, and it is true, that if the order in question is not supported by any evidence at all, the High Court may quash it; but the conclusion that the order in question is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify that conclusion. In the case before us, so far as question no. 1 of Science first paper was concerned, it was brought out that the petitioner had found out the square root of 45.5625 as 6.75 without doing any rough work or calculation. Petitioner explained it by saying that he

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(1) A.I.R. 1966 S.C. p. 675.

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worked out the square root orally. The Examinations Committee was of opinion that it was not possible to accept the explanation given by the petitioner that he worked out the square root of such a figure orally. After rejecting the explanation given by the petitioner it was open to the Examinations Committee to draw an inference that the petitioner had found out the square root by some improper method. It cannot be said that no reasonable person could have rejected the explanation given by the petitioner or that there was no basis for its rejection. Decision of the Examinations Committee was based on the intrinsic evidence provided by petitioner's own answer-book, which, if unexplained, could lead to an inference that petitioner had used unfair means in answering that question. We are, therefore, of opinion that there was material on the basis of which the Examinations Committee could come to the conclusion that the petitioner was guilty of using unfair means in answering question no. 1 of Science first paper.

So far as petitioner's answer to question no. 2 of Science second paper is concerned, the material before the Examinations Committee was that the petitioner was required to find out the equivalent weight of copper from the data mentioned in the question. Petitioner's solution of the question showed that first four or five lines were unnecessary and redundant. These superfluous lines tallied with those in the solutions given by six other candidates whose roll numbers were mentioned in the charge-sheet. The superfluous steps in the petitioner's answer were strikingly similar to those in the answers of the six other candidates. All of them solved the question by assuming the atomic weight of copper as 63.5, an assumption which was not at all necessary to be made in answering that question. In our opinion, on this material a reasonable body of persons could come to a conclusion that the petitioner had resorted to unfair means in answering that question.

We are, therefore, of opinion that there is no substance in the argument that the finding of the Examinations Committee that the petitioner was guilty of using unfair means in answering the two questions was not based on any material on the record.

Last point urged on behalf of the petitioner is that he has been improperly discriminated as against one other candidate, namely Jai Ram Pandey, student of the same institution, who was caught using unfair means red-handed. In his case, the Examinations Committee merely cancelled his 1971 Examination, whereas in the case of the petitioner not only his 1971 examination has been cancelled but he has also been debarred from appearing in the Board's examination for 1972. It has been pointed out in the counter-affidavit that the case of Jai Ram Pandey was different, inasmuch as Jai Ram Pandey was charged with bringing unauthorised material in the examination hall which material he did not use. The petitioner, on the other hand, was charged and found guilty of having actually used unfair means in the two papers. In the circumstances, there is no parity between the cases of the petitioner and Jai Ram Pandey. It cannot, therefore, be said that the respondents practised any discrimination in dealing with the cases of these two candidates.

In the result, we find no substance in any of the submissions made on behalf of the petitioner. The petition fails and is dismissed. Stay order dated 11th of February, 1971 is discharged. There will be no order as to costs.

Petition dismissed.

APPELLATE CIVIL

Before Mr. Justice S. Chandra and Mr. Justice

Gopi Nath

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SHANTI PRASAD

APPELLANT,

v.

AKHTAR AND ANOTHER

... RESPONDENTS.

U. P. Consolidation of Holdings Act, 1953, s 30(b)—*Agricultural plots sold with a right to re-purchase—Old plots included in a new Chak during consolidation proceedings—The liability to re-sale continues even in the new chak irrespective of change of identity of plots*

S 30 speaks of the liability of the tenure-holder. The liability should be in respect of his old holding. It need be a liability which attaches itself to the land like a charge. If the tenure-holder was under some legal liability, he would continue to remain subject to it.

The duty of the seller to execute a proper conveyance of the property agreed to be sold is a liability of the seller recognised by the law. It is an enforceable legal liability, which relates to the land mentioned in the agreement and such liability is transferred to new *chak*.

S. 30 includes a liability under s. 55(1)(d) Transfer of Property Act, and such a liability is enforceable against a tenure-holder in respect of a new Chak.

Second Appeal no. 766 of 1970 from the judgment and decree of Sushil Kumar, Civil Judge, Saharanpur, dated February 11, 1970 in Civil Appeal no. 281 of 1969.

H. S. Nigam, for the Appellant

N. A. Kazmi, for the Respondents

S. CHANDRA, J.:—This is a defendant's appeal. The suit was for specific performance of a contract of sale. Finding a conflict of opinion between *Sugna v. Kali Ram* (1) and *Chetan Singh v. Hira Singh* (2), a learned Judge has referred this appeal to a Division Bench.

On December 19, 1962, the plaintiff-respondent sold some plots of agricultural land to the defendant-appel-

(1) 1966 A.L.J. 1004

(2) 1969 A.L.J. 189.

lant for Rs.1,000 Thereafter, the parties executed an agreement for reconveyance of the sold property to the plaintiff within five years for the same sale consideration In July, 1967, the plaintiff by notice requested the defendant to execute a sale-deed after receiving the sale consideration, but the defendant without any justifiable cause refused to do so Hence the suit

The defendant raised several pleas of which only one survives now. It was urged that the plots in dispute came under consolidation operations and in lieu of the plots covered by the agreement between the parties, the defendant was allotted a chak consisting of entirely new plots The defendant was hence incompetent to execute a deed of sale in respect of the plots mentioned in the agreement. The contract was discharged by reason of supervening impossibility

The trial court accepted this plea and dismissed the suit, but on appeal the decree was reversed and the suit decreed. The lower appellate Court held that the decision in *Sugna v. Kali Ram* (1) proceeded upon conflicting views and hence it was difficult to apply it He preferred to rely upon the later decision in *Chetan Singh v. Hira Singh* (2).

S. 30, U. P. Consolidation of Holdings Act, provides:

“With effect from the date on which a tenure-holder enters, or is deemed to have entered into possession of the chak allotted to him, in accordance with the provisions of this Act, the following consequences shall ensue—

(a) the rights, title, interests and liabilities—

(i) of the tenure-holder entering or deemed to have entered into possession, and

(ii) of the former tenure-holder of the plots comprising the chak in their respective original holdings shall cease; and

(1) 1960 A L J 1004.

(2) 1960 A L J 189

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(b) the tenure-holder entering into possession, or deemed to have entered into possession, shall have in his chak the same rights, title, interests and liabilities as he had in the original holdings together with such other benefits of irrigation from a private source, till such source exists, as the former tenure-holder of the plots comprising the chak had in regard to them ;

(c) lands vested in the Gaon Sabha, or any local authority, and allotted to the tenure-holder shall be deemed to have been resumed by the State Government under the provisions of s. 117 or s. 117-A, as the case may be, of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U P Act 1 of 1951) and settled with the tenure-holder,

(d) the rights of the public as well as of individuals in or over land included in chak following a declaration made under the proviso to sub-s. (2) of s. 19-A shall cease to be created in the land specified for the purpose in the final Consolidation Scheme; and

(e) the encumbrances, if any, upon the original holding of the tenure-holder entering, or deemed to have entered, into possession, whether by way of lease, mortgage or otherwise, shall, in respect of that holding, cease and be created on the holdings, or on such part thereof, as may be specified in the final Consolidation Scheme."

Under this provision the rights, title, interests and liabilities of the tenure-holder in his original holding cease. The tenure-holder acquires the same rights,

title, interests and liabilities in the chak allotted to him. It is the rights, title, interests and liabilities of the tenure-holder which stand transferred to the chak allotted to him. If a tenure-holder was subject to any liability in respect of such holding, he shall remain subject to the same liability, but in relation to the new chak. The proper query is whether the tenure-holder was subject to any liability in respect of his old holding. If he was, then he continues to be subject to the same liability. In the context of the phrase "rights, title, interests and liabilities", "liabilities" would mean legal liabilities. In *Sugna's* case (1) DHAVAN, J held that the word "liability" meant legal liability, for example, liability to pay land revenue and so on. The learned Judge, however, held that an agreement to convey land does not create a liability in the land but only a personal right which can be enforced against the person making the agreement. Such a liability does not attach itself to the new plots. With respect, we are unable to agree with this view.

S. 30 speaks of the liability of the tenure-holder. The liability should be in respect of his old holding. It need not be a liability which attaches itself to the land like a charge. If the tenure-holder was under some legal liability, he would continue to remain subject to it. The identify of the property in respect of which he was liable changes.

S. 55, Transfer of Property Act, says that the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights mentioned in the rules next following. Cl. (d) of sub-s (1) provides that the seller is bound, on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property. The duty of the seller to execute a proper conveyance of the property

(1) 1966 A.L.J. 1004.

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agreed to be sold is a liability of the seller recognised by law. In other words, it is an enforceable legal liability. The liability relates to the land mentioned in the agreement. Such liability, in our opinion, is under s. 30(b), transferred to the new chak.

Cl. (c) of s. 30, Consolidation of Holdings Act, specifically provides for "creation" of encumbrances like lease, mortgage, etc. on the new holding. That would show that the legislative intent in using the term the "tenure-holder shall have the same liabilities" in cl. (b) was to give it a wider meaning than liabilities which attach to the land like a mortgage, lease, etc. In our opinion, section 30 includes a liability under s. 55(1)(d), Transfer of Property Act, and such a liability is enforceable against a tenure-holder in respect of the new chak.

We have perused the decision in *Chetan Singh's* case (1) and we agree with the conclusion reached there, though the point was not discussed in that case.

In the present case the lower appellate court has found that the chak allotted to the defendant represented his old holding which was the subject-matter of the agreement to sell. In our opinion, the plaintiff was entitled to enforce the agreement against the new chak. The suit was rightly decreed.

In the result, the appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice K. B. Asthana

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... APPELLANT,

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v.

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NANWA AND ANOTHER

... RESPONDENTS

U. P. (Temporary) Control of Rent and Eviction Act, 1947,
s. 3(1)(a)—*Lawyer's notice for arrears of rent and ejectment—Money sent to lawyer within one month—No default.*

Once a duly instructed lawyer is a 'landlord' competent to send a notice of demand there is no reason why it should not be held as a matter of law that he is competent to accord satisfaction to the tenant who tenders the amount of arrears to him.

When an agent or attorney is authorised to make a demand by notice and that person in compliance with the notice tenders the requisite sum of money or chattel to the agent, it would be compliance of the notice of demand

Held, that the notice of demand was complied with by the defendant-tenant and he was not in default.

Second Appeal no. 253 of 1965 against the judgment and order of J. M. SRIVASTAVA, IIInd Additional Civil Judge, Meerut, dated December 11, 1964, in Civil Appeal no. 791 of 1964

A. D. Prabhakar, for the Appellant.

N. C. Rajwanshi, for the Respondent.

K. B. ASTHANA, J.:—The only point which arises in this appeal is whether the tender of the arrears of rent by the defendant-tenant to the lawyer who sent the notice of demand on behalf of the plaintiff-landlord, within one month of the receipt of the notice, amounted to valid compliance with the said notice and the defendant-tenant cannot be held to have failed to pay the arrears demanded within the meaning of s. 3(1) (a) of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter called the Act).

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Both the courts below have held on the reading of the contents of the notice that the lawyer not having been authorised to receive the arrears of rent the tender made to him would not amount to a compliance of the demand

I have heard at some length the learned counsel for the parties. It was argued on behalf of the defendant-appellant that the lawyer having been authorised to demand the arrears of rent on behalf of the landlord, it would be implicit in his authority to accord satisfaction to the person from whom the demand was made, hence the tender of rent to the lawyer would amount to a tender to the landlord and the notice of demand would stand complied. It is submitted that the language of s. 3(1)(a) casts the responsibility on the landlord to serve a notice of demand. The 'landlord' has been defined by s. 2(c) of the Act as "a person to whom rent is payable by the tenant in respect of any accommodation and includes the agent, attorney, heir or assignee of such person". I think if the definition of landlord under the Act did not include an agent or attorney of the landlord, then a notice of demand sent by a duly instructed lawyer could not be said to be a notice by landlord within the meaning of s. 3(1)(a) of the Act. It is by force of that definition that the notice by a duly instructed lawyer, who will be the agent or attorney, achieves validity as one sent by the landlord within the meaning of s. 3(1)(a) of the Act. Once a duly instructed lawyer is a 'landlord' competent to send a notice of demand there is no reason why it should not be held as a matter of law that he is competent to accord satisfaction to the tenant who tenders the amount of arrears to him. There appears to be some force in the argument of the learned counsel for the defendant-appellant, but it was contended by the learned counsel for the plaintiff-respondent that in the notice it having been

intimated to the defendant-tenant that he must tender the arrears of rent within one month of the receipt of the notice to the landlord, it must be held that the lawyer was not authorised to receive the rent and accord satisfaction to the tenant. To my mind, a direction in the notice by the lawyer that the rent be paid to the landlord ought not to be construed as laying down the terms regarding the scope of the authority of the lawyer. Since the rent is always payable to the landlord, a mere mention in the notice that it be paid to the landlord is no more than repeating in the notice what the contract of tenancy expects the tenant to do. A lawyer can be instructed by the landlord to intimate to the tenant to tender the arrears of rent to somebody else and the lawyer then in the notice will intimate to whom the tender is to be made and in such a case if the tenant tenders the rent to landlord and not to the person nominated, then can it be said that the notice remains uncomplied? I think not. The destination of the money representing the arrears of rent fixed by the notice would not be conclusive of the authority or the scope of the authority of the lawyer. As I understand the law, when an agent or attorney is authorised to make a demand by notice of any sum of money or chattel from another person and that person in compliance with the notice tenders the requisite sum of money or the requisite chattel to the agent, it would be compliance of the notice of demand. It is not possible for me to agree with the contention of the learned counsel for the plaintiff-respondent that since the notice intimated that the tender be made to the landlord, it would imply that the lawyer who gave the notice, had no authority to accord satisfaction by receiving the arrears of rent tendered by the tenant.

Another difficulty which I find in accepting the contention of the learned counsel for the plaintiff-res-

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pondent is that a notice of demand by a duly authorised lawyer will be competent under s. 3(1)(a) of the Act only if the lawyer is a 'landlord' within the meaning of that section. On the language of the section, therefore, the payment within one month of the receipt of the notice has to be tendered to the lawyer as he is the landlord within the meaning of that section. If it be said that the lawyer was only authorised to send a notice of demand and serve it upon the tenant but was not authorised to receive the payment, then such a lawyer cannot be said to be 'landlord' within the meaning of s. 3 (1)(a).

My attention has been drawn by the learned counsel for the plaintiff-respondent to an unreported decision of K. N. SRIVASTAVA, J., in the case of *Haji Bundu alias Buniad Ali v. Haji Bundu* (1), in which under similar circumstances the learned Judge held that the recital in the notice clearly showed that no authority was given by the landlord to the lawyer and the latter had no power to accept the rent.

Since I doubted the correctness of the view taken by my brother K. N. SRIVASTAVA, J. I referred the matter to a Division Bench who by its order, dated March 13, 1972 held that the observations made, in the case of *Haji Bundu alias Buniad Ali v. Haji Bundu* (1), by K. N. SRIVASTAVA, J. ought to be treated as a finding given on the facts of the case and they would not have any value as a precedent on a point of law. The Division Bench further observed that it was open to the learned single Judge to have reached his own conclusion on the facts and circumstances of the case.

For the reasons given in the preceding paragraph of this judgment, I think on the facts and circumstances of the instant case the tender of arrears of rent to the lawyer of the plaintiff-landlord by the defendant-

(1) S. A. no. 1425 of 1964, dated April 9, 1971.

tenant would be a valid tender and would be in compliance with the notice of demand. The finding of the court below that the tender of arrears of rent to the lawyer did not amount to compliance of the notice of demand of arrears of rent within the meaning of s. 3 (1)(a) of the U P (Temporary) Control of Rent and Eviction Act is erroneous and is set aside. I hold that the notice of demand was complied with by the defendant-tenant and he was not in default. The suit of the plaintiff-landlord was, therefore, barred by the provisions of s. 3 of the said Act and was not maintainable.

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Accordingly, I allow this appeal, set aside the judgment and decree of the court below and dismiss the plaintiff's suit for eviction of the defendant from the building with costs throughout.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice S. Chandra and Mr. Justice K. N.

Seth

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RESPONDENTS.

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 May, 10.

U. P. Municipalities Act, 1916, ss. 8 and 298—Area falling outside the limits of the Municipal Board—Board's power to frame bye-laws for such an area.

The Municipal Board has power to frame bye-laws for an area outside the Municipal limits by virtue of powers conferred by s. 8(1) read with s. 298 of the Act provided it has obtained the sanction of the prescribed authority.

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Special Appeal no. 201 of 1967 from the judgment and order of G. C. MATHUR, J. in Civil Miscellaneous Writ no. 3569 of 1961 decided on September 31, 1966.

Advocate-General, L. P. Nathani, S. K. Suri, Sridhar and Ashok Mohiley, for the Appellant.

K. C. Saxena, S. S. Chandwarua and Kamla Nath, for the Respondents.

S. CHANDRA, J.:—Respondent no. 1 instituted a writ petition against the Municipal Board, Farrukhabad. His grievance was that though he had obtained a licence from the Ramlila Committee for holding a market for the sale of potatoes on a piece of land owned by it yet the municipal authorities have instituted prosecution against the shop-keepers who have opened stalls under a permission granted by the petitioner. At the hearing of the writ petition no one appeared on behalf of the Municipal Board nor was any counter-affidavit filed. It was argued on behalf of the petitioner respondent that the bye-laws under which the persons selling potatoes could be required to obtain a licence from the Municipal Board were *ultra vires* their powers and hence their action in prosecuting the stall-holders was illegal. A learned single Judge accepted this submission and allowing the writ petition, he quashed the proviso added to the bye-laws under notification, dated July 8, 1954. The Municipal Board was restrained from interfering with the respondent's holding the market. Aggrieved, the Municipal Board has come up in appeal.

The appeal was filed beyond the prescribed period of limitation. By a separate order we have condoned the delay.

It appears that the Municipal Board had under s. 298 of the U. P. Municipalities Act framed and pub-

lished certain bye-laws for regulating the markets within the municipal limits and also within an area of one mile around the municipal limits of Farrukhabad-cum-Fatehgarh Municipality. The bye-laws were amended by a notification, dated July 8, 1954, by adding the phrase "but excluding tobacco and potato" at the relevant place in bye-law no. 1. On January 12, 1961, the Municipal Board amended the bye-laws again. On this occasion the phrase "but excluding tobacco and potato" which had been added on July 8, 1954, was deleted; with the result that tobacco and potato sellers came within the purview of the bye-laws. Bye-law no. 1 required the traders in the mentioned commodities to obtain a licence before they are entitled to continue the trade.

The land where the respondent was holding the market was situate outside the municipal limits of Farrukhabad though it was within the one mile area around it. The question, therefore, is whether the Municipal Board has power to frame bye-laws in relation to this subject for an area falling outside the limits of the Municipal Board.

Mr. Advocate-General appearing for the Municipal Board has invited our attention to s. 8 of the U. P. Municipalities Act. This section states—

"8. *Discretionary functions of boards*—(1) A board may make provision, within the limits of the municipality, and with the sanction of the prescribed authority outside such limits for—

(iii) taking measures to promote trade and industry ;

.

(m) adopting any measure, other than a measure specified in s. 7 or in the foregoing

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provisions of this section, likely to promote the public safety, health, or convenience;

.

In *Municipal Board, Lucknow v. Sardar Iqbal Singh* (1), a Division Bench of this Court held that the words "make provision" in s. 8 is indicative of the fact that something in the nature of a bye-law has to be made in order to enable the Board to perform any of the discretionary functions enumerated in s. 8. It is thus clear that the bye-law making power of the Board is utilisable for enabling the Board to perform its discretionary functions mentioned in s. 8. The impugned notifications are admitted by both the parties to have been passed under head 'F' of list I appended to s. 298 (2). S. 298 permits a Board to make bye-laws for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality and for the furtherance of municipal administration under the Act. Under sub-s. (2) without prejudice to the generality of the power conferred by s. (1), the Board has the power to make bye-laws for matters described in List I. Under head 'F' of List I, bye-laws can be made for markets, slaughter-houses, sale of food, etc. These subjects are, in our opinion, covered by the phrase "safety and convenience" occurring in sub-s. (1) of s. 298 and also in cl. (m) of s. 8(1) of the Act. The law seeking to regulate the sale of goods would also be within the purview of cl. (iii) of s. 8(1) because regulation of the sale of food, etc. would be taking measures to promote trade in those goods. We are of the opinion that the impugned bye-laws were *intra vires* the powers of the Municipal Board conferred by s. 8(1) of the Municipalities Act read with s. 298 thereof.

Under these provisions the Municipal Board had power to frame bye-laws for an area outside the municipal limits provided it obtained the sanction of the

(1) 1968 A.L.J. 648.

Prescribed Authority. In the case of the appellant Board the Prescribed Authority was the Commissioner of the division. The impugned notifications on their face show that the proposed amendments have been confirmed by the Commissioner. Thus this requirement was also fulfilled. We see no illegality in the impugned notifications. In the result the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed. Under the circumstances we make no order as to costs.

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We may observe that the learned Advocate-General at the hearing of the appeal before us stated that in spite of the success of the appeal the Municipal Board will not prosecute the stall-holders in the land in dispute for the violation of the Bye-laws during the period ending with today.

Appeal allowed.

APPELLATE CIVIL (F. B.)

*Before Mr. Justice S. Chandra, Mr. Justice M. N.
Shukla and Mr. Justice K. N. Seth*

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LOCOMOTIVE, VARANASI ... RESPONDENT.

Interpretation of Statute—Proviso dependent on the main enactment—Cannot be read as a substantive provision.

The normal rule of construction with regard to a proviso is that it must *prima facie* be limited in its operation. It cannot be treated as if it were an independent enacting clause instead of being dependent on the main enactment. It is

foreign to the proper function of a proviso to read it as a substantive provision save in very exceptional cases.

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Workmen's Compensation Act, 1923, s. 3(1)—*Workman injured during the course of his employment—Accident not arising out of employment—Compensation under s. 3(1) cannot be allowed.*

(Per Majority M. N. SHUKLA and K. N. SETH, JJ; S. CHANDRA, J. *contra*): It is not enough that the accident took place in the course of employment and it must be further established that it arose out of the employment. The words 'out of' and 'in course of employment' are used conjunctively and not disjunctively. What arises in the course of the employment is to be distinguished from what arises out of the employment. The former words relates to time conditioned by reference to the man's service, the latter to casuality. Not every accident which occurs to a man during the time when he is on his employment—that is, directly or indirectly engaged on what he is employed to do—gives a claim to compensation, unless it also arises out of employment.

F. A. F. O. no. 273 of 1968 from the orders of the workmen's Compensation Commissioner, Varanasi (Additional District Magistrate—E), dated June 28, 1968.

Kameshwar Prasad Agarwal, for the Appellant.

Vinod Swarup, for the Respondent.

S. CHANDRA, J.:—This is an appeal under s. 30 of the Workmen's Compensation Act, 1923, against an order disallowing a claim for compensation. At the hearing of the appeal, a learned single Judge felt that there was considerable conflict of opinion on the questions of law involved in this case. He consequently referred the appeal to a Full Bench.

Mohammad Ayub Khan, the deceased husband of the claimant-appellant was employed as Works Supervisor in the Diesel Locomotive Works Project, Varanasi. June 4, 1967, was his rest day but owing to some work the Senior Civil Engineer ordered him to report for duty on that day. In pursuance of this order he started

from his house at about 6 30 in the morning On the way, he was assaulted by some unknown persons. As a result of the injuries caused to him he died on the spot His widow instituted a claim for Rs.8,000 as compensation against the employer.

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The Diesel Locomotive Works, the employer of the deceased, admitted that Ayub Khan was employed as alleged and that he was murdered on June 4, 1967 while going to join his duty. It was, however, pleaded that the deceased did not receive personal injury at an accident arising out of and in the course of his employment within the meaning of s. 3(1). Workmen's Compensation Act It was asserted that he was murdered because of personal enmity and so the employer was not liable to pay compensation

In support of the claim the appellant produced two witnesses. J K. Mital (P W 1) was the Senior Civil Engineer at the D L W., Varanasi He stated that June 4, 1967 was the rest day of the deceased but he had called him for doing certain work. He died as a result of the assault near the grain godown of the D L W This godown was not within the premises of the D. L W., but was adjacent to it The deceased was living outside the D. L W. premises but the place where he was murdered was his usual way for coming to the D L. W In cross-examination he stated that the place where the murder took place was within the limits of their territorial control.

P W 2, Zakir Husain was the father of the deceased. He stated that his son left his house at 6 30 in the morning on a bicycle in order to report for duty. He was murdered on the way He did not know the reason or the motive for the murder.

The employer-respondent adduced no evidence, documentary or oral.

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The Workmen's Compensation Commissioner held that June 4, 1967 was admitted to be the rest day of the deceased but none the less he had been called to report for duty on that day. He was waylaid near the foodgrains godown which was not within the premises of the D. L. W. The passage where he was murdered was safe in the ordinary course, and that he was killed by some body on account of personal enmity. On these findings the Commissioner came to the conclusion that the accident did not arise out of and in the course of the employment of the deceased with the D. L. W. The claim was dismissed.

Under s. 30 Workmen's Compensation Act, an appeal against such an order lies only on a substantial question of law. The findings of fact cannot be questioned. On behalf of the appellant it was, however, urged that the finding that some body killed Mohammad Ayub Khan out of personal enmity is vitiated by an error of law because there was no evidence in support of it. Learned counsel for the respondent was not able to point to any material from which either expressly or by implication an inference can be drawn that the cause of the murder was personal enmity. A finding without any evidence can be interfered with in appeal on the ground that it suffers from a substantial error of law. I would, therefore, ignore this finding.

Learned counsel then pointed out that it is true that Sri Mital stated that the foodgrains godown was not within the premises of the D. L. W. but it was pointed out that the same witness had in cross-examination clearly stated that the godown was within their controlling area. This was a very significant statement which, since it was elicited in cross-examination conducted by the employers, and against which the employers led no rebutting evidence, was binding on them. The fact that the place of the murder was territorially controlled

by the employers would only mean that a person could be at that place only with the permission of the employers and that no member of the public would have any right to be there. The learned Commissioner overlooked this part of the statement and since this fact can be treated as admitted between the parties, it ought to be taken into consideration.

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The claim for compensation was laid under s. 3, Workmen's Compensation Act, sub-s. (1) whereof states—

“(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable—

(a) in respect of any injury which does not result in the , total or partial disablement of the workman for a period exceeding seven days;

(b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to—

(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of the workman, or

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen.”

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It will be seen that the liability to compensation arises if personal injury is caused to a workman by an accident, provided the accident arose out of and in the course of his employment. Under the proviso, if the personal injury results in death of the workman, the employer will be liable, even though the workman may himself have contributed to the accident by being under the influence of drink or drugs or by wilfully disobeying security measures or removing security devices. In case of death, the Legislature has specifically included cases where the workman by his misconduct of the kinds mentioned in the proviso causes the accident. Such accidents will none the less be deemed arising out of and in the course of his employment. Obviously, the legislative intent is to widen the significance and concept of an accident arising out and in the course of employment, in cases of death.

The Workmen's Compensation Act, 1923, is in *pari materia* with the Workmen's Compensation Act, 1897 (replaced by the Act of 1906) of England. The relevant provisions of the two Acts are identical in language. The Courts in this country have hence considered English decisions while determining the meaning and connotation of the terms 'accident', 'arising out of' and 'in the course of employment'.

The term 'accident' caused controversy. Did it imply, as in Criminal Jurisprudence, absence of *mens rea* or was *mens rea*, irrelevant as in insurance contracts. Lord MACNAGHTEN in *Fentons v. Thorley* (1) held that the Act used 'accident' in its popular sense as denoting an unlooked for mishap or an untoward event which it not expected or designed.

This, however, did not close the point. Injury by assault was designed by the aggressor. Is such an assault an accident?

(1) (1903) A.C. 448.

This was settled in *Kelly's* case (1). The majority held that it must not be designed by the sufferer. Viscount HALDANE, L. C. observed that the principle of the Workmen's Compensation Act was one more akin to insurance at the expense of the employer against accidents arising out of and in the course of his employment, than to the imposition on the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. The fundamental conception is that of insurance in the true sense. In this context 'accident' would mean the kind of event which is unlooked for and sudden and causes personal injury. If, so far as the workman is concerned, unexpected misfortune happens and injury is caused, he is to be indemnified.

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Referring to the proviso of the governing section (which was in terms similar to the proviso in our Act) it was observed that the language used in the proviso confirms the view that 'accident' is used as including a mishap unexpected by the workman, irrespective of whether or not brought about by the wilful act of some one else. The view taken by the Court of Appeal in *Nishet v. Rayne* (2) and in *Anderson v. Balfour* (3) that the definition of 'accident' extended to a case of death by murder was affirmed. It was observed that 'injury by accident' is an integrated phrase and an event in the ordinary and popular sense can be described as an accident even though it was caused by deliberate violence.

There is no evidence that the occurrence in which Mohammad Ayub Khan received personal injuries was designed by him. The cause or the motive of the occurrence is unknown. It must be held that it was a mishap or an unexpected misfortune so far as the de-

(1) (1914) A.C. 667.

(2) (1910) 2 K. B. 689.

(3) (1910) 2 I.R. 497.

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ceased workman was concerned. It was an 'accident' within meaning of s. 3(1) of the Workmen's Compensation Act.

The accident, however, must arise out of and in the course of his employment. The phrase "out of and in the course of employment" has proved troublesome.

"The word employment" said Lord FINLAY in *Davidson and Co v. M. Robb* (1) "must mean the same thing when in apposition with 'in the course of' as it means when in apposition with 'out of'."

Employment was held to mean the discharge of the duties of the workman. This was understood to point to the specific work he was employed to do. Lord FINLAY in *Dennis v. A. J. White and Co.* (2) observed that if the injury is by assault it is material to show that the nature of the work involves liability to such mishaps, as in the case of a game keeper or watchman.

Lord SHAW of Dunfermline in *Thom or Simpson v. Sinclair* (3) held that this would mean that the words "arising out of the employment" should be construed to mean "arising out of the nature of the employment." "The noble Law Lord declined to so narrow the statutory words. It was observed that when a minor is engaged to hew coal, and in the course of his work brings down upon himself a mass of superincumbent material it is plain that such a case would fall within the limited construction. But what would result in those infinitely more numerous cases of accident to underground workers, the specific nature of whose employment was, for instance, not in actual excavation, but merely in the haulage of the coal or the lighting or watching of the pit? Accidents arise, not from anything in the nature of the particular miner's work, but pos-

(1) (1918) A. C. 815.

(2) (1917) A.C. 479 (482).
 (3) (1917) A. C. 127 (140, 141).

sibly from causes, say, subsidence, fires, or escape of gas, taking their origin, it may be miles away, communicating along the strata of the earth and in no way casually connected with the particular workman's jobs. In all such cases it is quite possible to figure injuries by accident in the course of and arising out of employment which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which without any doubt sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone that he incurred the danger. His Lordship then held—

“In short my view of the statute is that the expression ‘arising out of employment’ is not confined to the mere nature of the employment. The expression in my opinion applies to the employment as such—to its nature, its conditions, its obligations, its incidents.”

This statement of the law was approved by our Supreme Court in *M. Mackenzie v I. M. Issak* (1). It will be seen that though the elucidation was general, the principle was laid down in the context of the phrase “arising out of employment”.

To clarify, the same learned Judge said in *St. Helens Colliery Co. v Hewitson* (2) that “that opinion substantially showed my estimate of what was the scope and meaning of the word ‘employment’ under the statute. I respectfully adhere to that view (*which applies equally to the phrase ‘in the course of employment’*)” (*Italicised mine*).

In the context of both ‘out of’ and ‘in course of’, ‘employment’ has to be understood in the same and liberal sense: Something like ‘the exigencies of the service’.

(1) AIR 1970 S C 1906.

(2) (1924) A C 59 (88).

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The conditions or obligations of employment were referable to the duties of the workman, express or implied. Courts differed on the nature and scope of duty. In *Hewitson's* case (1) the majority in the House of Lords took a strict view. It was held that the workman should be under the control of the employer at the time of accident and be bound to do what he was doing. There the employer had provided special trains to transport its workers to and from the place of work. But the workmen were not bound to use them. An accident at the railway platform was held outside the Act.

The matter was reviewed by the House in *Weaver v Tredegar Iron & Coal Co Ltd* (2). The accident occurred at a railway platform provided by the employer for the workmen's transport by railway. Lord ATKIN observed that the word duty in the test has such a wide connotation that it gives little assistance as a practical guide. It was held that though the workmen were not bound to use the train, but it practically all the workmen used it, they used it as a condition or incident of the employment. It was held that if a workman, in order to get to the actual place of work, had to enter and leave premises or areas on which otherwise he had no right to be and no reason for being, and, if an accident happens while the workman is so trying to get to his actual place of work, it is related to the employment, because it was part of his duty both to go to and to proceed from the work which he is employed to do.

This view of duty has been accepted by our Supreme Court in *B. E. S. T Undertaking v Mrs. Agnes* (3). SUBBA RAO, J. held that though at the beginning the word duty has been strictly construed, the later decisions have liberalised its concept. A theoretical option to

(1) 1924 A.C. 59 (88)

(2) 1940 (8) A.E.R. 157

(3) A.I.R. 1964 S.C. 193.

take an alternative route may not detract from such a duty if the accepted one is of proved necessity or of practical compulsion.

The words 'out of' connote origin, source or cause. It has been said that there ought to be a causal connection. The accident should be the effect of which the cause is employment. In *Upton v. Great Central Railway Co.* (1) Viscount HALDANE observed that the expression 'arising out of' no doubt imports some kind of causal relation with the employment, but it does not logically necessitate direct or physical causation. It was held—

"That the accident should have arisen out of his fulfilment of these conditions (namely the conditions under which he was employed) seems to be all that is required to establish the only kind of causation that is demanded".

There an employee of a railway company was sent from station A to station B to repair a water main there. After finishing his work he returned to station B and awaited arrival of the train for A. As the train came in, he hurried across the platform to reach the proper carriage and slipped and hurt his knee, and he died as a result of the injury. It was admitted the injury arose in the course of employment. The House held it arose out of employment as well, because he was crossing the platform in fulfilment of the implied direction of the employer to return to station A. The fulfilment of the implied duty was the causal relation, because it brought the man to the place of accident.

In *M. Mackenzie v. I. M. Issak* (2) the seaman (who was killed by unexplained drowning) was off-duty when he fell off the deck. It was held that the accident did not arise out of employment. The Supreme Court

(1) (1924) A. C. 802.

(2) A I.R., 1970 S. C. 1906.

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referred to the distinction drawn by FARWELL, L. J. in *Bender v. Owners of S S. 'Zent'* (1) that if a sailor was on duty as a member of the watch and he disappears, an inference might fairly be drawn that he died from an accident arising out of his employment. But if he was not a member of the watch (that is he was off-duty) and he came up on deck and disappeared, the accident could not be said to arise out of employment. It is being engaged in fulfilling some duty, that makes the main difference.

The fact that the employment brings the man to the place of accident, where he would otherwise have no right to be and no reason for being, establishes the causal relation between the obligations of employment and the accident, specially when the other relevant fact as to the cause is known. Such an accident "arises out of" the employment. The words "out of" emphasise that the purpose of the workman's being at the place of the accident should be the employment.

The words "in the course of" point to the time element of employment. The workman must have entered his employment and must not have left it, at the place and time of the accident.

It was once thought that employment begins at the employer's premises and ends when the "down tool" signal is given, or when the workshop is left. This conservative view was given up. LORD ATKIN said in *Weaver v Tredegar Iron & Coal Co. Ltd.* (2)—

"It does not necessarily end when the 'down tools' signal is given or when the actual workshop where he is working is left. In other words the employment may run its course by its own momentum beyond the actual stopping place. There may be some reasonable extension in both time and space."

(1) (1909) 2 K B 41.

(2) 1940 (3) A.E.R. 157 (164).

This passage has been referred with approval by our Supreme Court more than once: see *Saurashtra Salt Manufacturing Co. v. Bai Valu Raja* (1) and *B. E. S. T. Undertaking v. Mrs. Agnes* (2).

The decided cases show the extent of this notional extension of the employer's premises or, as Lord ATKIN put it in *Weaver's* case (3) "of the area (or the immediate area) of the employment", or as SUBBA RAO, J. held "of the area of the field of employment. "In *Weaver's* case (3) Lord ATKIN after illustrating several cases of "going to" or "coming from" held that the course of employment runs till the place or area where the workman has no right to be and no reason for being except because of the conditions of his employment. The course includes, apart from the actual work-place, such places or areas which the employer provides or controls to facilitate the ingress or egress of his workmen.

The course of employment thus does not necessarily run up to the place of the workman's residence. The facts of each case have to be examined to determine its limits. In the present case Ayub Khan had been called on duty on his rest day. He was going on a bicycle to report for work when the accident happened. The obligation of his employment brought him to that place. This was the causal relation. The accident thus arose out of his employment.

The place of occurrence was within the area of control of the employers. The deceased was going on the habitual route. The accident at such a place would be in the course of the employment.

The injury, namely death by accident arose out of and in the course of employment of Ayub Khan. His

(1) A.I.R. 1968 S. C. 881 (882). (2) A.I.R. 1964 S. C. 198 (199).
(3) 1940 (3) A.E.R. 157.

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dependants were within the Act, entitled to compensation.

In some decided cases phrases like 'dangerous spot', 'special peril' or 'added risk' have been used. When considered out of context they cause confusion. There may be cases where the nature of the employment involves risks peculiar to it. In those cases a direct causal relation exists. They are special risks. A warden of a lunatic asylum, a game-keeper or a watchman face risk of an assault, because the nature of their work involves it. Employment, however, has been used in the Act in a wider sense, to cover in addition its conditions, obligations and incidents. These elements may expose the workman to risks of an accident. Such risks are what are generally called "environmental" or "community" risks, i.e. risks inherent in the surroundings like risks from natural forces (e.g. lightning, etc.). There are other general risks popularly called "street" or "locality" risks. In all these, the casual connection is not direct, but proximate. In such cases the relevant query is not whether the nature of the employment involves the risk, but whether the workman faced the dangerous spot during the time of his employment and while doing his employer's work or fulfilling some obligation or condition of his employment.

The Privy Council in *Margaret v. T. B. Sons Ltd.* (1) held that the phrase "dangerous spot" means a spot which in fact turns out to be dangerous. It dissented from the definition of this phrase by Lord WRENBURY in *Allcock v. Rogers* (2) as a place which has some quality which results in danger, as for instance, that an insecure wall which may fall, exists there.

With respect, I am in agreement with the decision of CHAGLA, C. J. in *Bhagubai v. General Manager, Central Railway* (3). In that case the deceased was employed

(1) A.I.R. 1933 P.C. 225 (229).

(2) 118 L.T. 886.

(3) A.I.R. 1955 Bom 105.

in Central Railway at a station and he lived in the railway quarters adjoining the railway station. It was found as a fact that the only access for the deceased from his quarters to the railway station was through the compound of the railway quarters. One night the deceased left his quarters a few minutes before midnight in order to join duty and immediately thereafter he was stabbed by some unknown persons. There was no evidence that the employee was done to death because some one was interested in murdering him. It was admitted that the accident arose in the course of his employment. It was held that the authorities had clearly laid down that if the employee in the course of his employment has to be in a particular place and by reason of his being in that particular place he has to face peril and the accident is caused by reason of that peril which he has to face, then a casual connection is established between the accident and the employment, because the peril was incidental to his employment. I would respectfully add that the peril or the risk was incidental to the employment because at the time of the accident the deceased was fulfilling an obligation of his employment, namely to join duty, and while doing so he became exposed to the risk of being assaulted. The facts of this case are similar to the present one and the decision is applicable.

Learned counsel for the employer sought to place reliance upon *Fitzgerald v. S. G. Clarke & Son* (1). The House of Lords in *Thom or Simpson v. Sinclair* (2) held this decision to be doubtful. Learned counsel also referred to *Kelly's* case (3). An assistant master at an industrial school, while engaged in the performance of his duties was assaulted by two of the pupils and killed. The entire discussion was if the event was "an accident". The majority held that the motive of the assaulter was

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(1) (1908) 2 K.B. 796.

(2) (1917) A.C. 127 (188).

(3) (1914) A.C. 667.

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immaterial. The victim had not designed it and so it was an accident. This case is not an authority for the plea that an assault would arise out of the employment only when the motive of the assaulter is known, and the motive connects it with the work of the victim. As already seen, such a submission has been repeatedly repelled. If it is established, as the evidence in *Kelly's* case (1) did, that the aggressors planned the murder because of the victim's toughness in his work, the fact goes to show the existence of a direct cause. But as seen, a direct causal relation is not necessary. A proximate connection is also enough. If the victim is "on duty" (in its liberal sense), the accident arises out of employment.

In my opinion, the phrase "in the course of and arising out of" denotes an integrated idea involving the concept of time, place as well as purpose. As explained above, if these factors are established, i.e. the workman is at the place of the occurrence during his employment and for the purposes of his employment, the employer can get out of the Act only if it is proved that the occurrence was designed by the workman (as in the case of a suicide) or was due to his wilful misconduct (as in a case of personal enmity). If these facts are proved, the case, in my opinion, goes outside the Act because then it ceases to be an "accident" as known to the section. An event proved to be designed or expected by the workman is not an "accident". In the present case, there is no evidence of suicide or personal enmity. The employer remains liable.

The Employees' State Insurance Act, 1948, is in *pari materia* with the Workmen's Compensation Act, 1923. It by s. 3 establishes an Employees' State Insurance Corporation and by s. 26 an Employees' State Insurance

(1) (1914) A.C. 667.

Fund to which the Central Government makes a grant (s. 27) and to which contributions are made by the employees as well as the employer (s. 39). S. 38 provides that subject to the provisions of this Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by the Act. S. 1(4) states that the Act shall apply in the first instance to all factories including factories belonging to the Government other than seasonal factories. S. 28 lays down the purposes for which the Employees' State Insurance Fund shall be expended. One of the purposes is payment of benefits to insured persons and to their families. S. 52 provides for dependants' benefits. It says that where an insured person dies as a result of an employment injury sustained as an employee under this Act, dependants' benefits shall be payable to his dependants at such rates and for such period as is specified in the Second Schedule. S. 53 provides for disablement and dependant's benefits. It says—

"53 Disablement and dependants' benefits—

Where an insured person is or his dependants are entitled to receive or recover, whether from the employer of the insured person or from any other person any compensation or damages under the Workmen's Compensation Act, 1923, or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act, then the following provisions shall apply, namely:

- (i) The insured person shall, in lieu of such compensation or damages, receive the disablement benefit provided by this Act (but subject otherwise to the conditions specified in the Workmen's Compensation Act, 1923) from the Corporation and not from the employer or other person.

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(ii) If the insured person dies as a result of the employment injury sustained as an employee under this Act (whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury), dependants' benefit shall be payable at the rates and in the proportion specified in the Second Schedule to his widow or widows during her or their widowhood, and to minor legitimate or adopted sons and minor legitimate unmarried daughters.

(iii)

(iv)

(v) Save as modified by this Act, the obligations and liabilities imposed on an employer by the Workmen's Compensation Act, 1923, shall continue to apply to him."

This Act, provides for payment of benefits for employment injuries to the insured person and in case he dies to his dependants. Compensation for employment injury is payable to the insured person by the Corporation, the employer is not liable to pay it. But in case of death, the dependants are entitled to claim compensation at the rates specified in the Second Schedule from the Corporation, and this is not in lieu of their entitlement to the compensation under the Workmen's Compensation Act, 1923, but appears to be in addition to it.

The insured person or his dependants can claim compensation only in respect of an employment injury. S. 2(8) defines an employment injury to mean a personal injury to an employee caused by an accident or an occupational disease arising out of and in the course of his employment in a factory or establishment to which

this Act applies, which injury or occupational disease will entitle such employee to compensation under the Workmen's Compensation Act, 1923, if he were a workman within the meaning of the said Act. It will thus be seen that the entitlement to compensation under the State Insurance Act is in respect of the same injury for which compensation is provided in the Workmen's Compensation Act, 1923, namely an injury by accident arising out of and in the course of his employment

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Under the Employees' State Insurance Act the employee also makes a contribution to the Fund from which he or his dependants are entitled to receive the benefits. The significance and connotation of the expression "arising out of and in the course of employment" given to the phrase occurring in the Workmen's Compensation Act will have a direct impact upon the right of the workman to claim compensation under the State Insurance Act. This phrase should, therefore, be construed liberally so that the combined object of the Workmen's Compensation Act and the Employees' State Insurance Act of providing Insurance is advanced. It should not be so construed as to deprive an employee from getting compensation from the Corporation even though he may have contributed a substantial sum to it as an insurance against a contingency like death owing to an employment injury. This aspect also impels me to construe the phrase "arising out of employment" in its liberal and realistic sense.

It is agreed that the monthly wages of the deceased was Rs.285.50. Under s. 4 read with the 4th Schedule of the Act, the employers were liable to pay Rs.8,000 as compensation.

In the result, the appeal is allowed. The impugned order is set aside. The application for recovery of Rs.8,000 is decreed with costs throughout.

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M. N. SHUKLA, J.:—I have had the advantage of perusing the judgments prepared by my learned brothers. Hence, it is not necessary for me to repeat the facts of the case and I shall content myself merely with the treatment of the question of law which falls for decision. I regret my inability to agree with the conclusion reached by Hon'ble SATISH CHANDRA, J.

The employer's liability under the Workmen's Compensation Act arises provided the conditions laid down in s. 3 of the Act are fulfilled. This provision has been the subject of a catena of judicial decisions, English as well as Indian. The one point which emerges from these decisions is that the condition precedent to a liability under the said provision is a causal connection or association between the employment and the injury caused by the accident. If after looking at the whole body of facts it can be drawn as a fair inference and without overnice conjectures that an act done in carrying out the conditions of the employment caused the accidental injury, the employer would be liable for paying compensation. In the instant case where the workman was murdered no liability for compensation can be fastened on the employer unless some nexus can be established between the employment as such and the act of murder. This aspect of the nature of liability under the Workmen's Compensation Act is fully illustrated by the decision in the leading case of the House of Lords in *Board of Management of Trim Joint District School v. Kelly* (1). The facts of that case were that an assistant master at an industrial school, whilst engaged in the performance of his duties, was assaulted by two of the pupils in pursuance of a pre-concerted plan of attack and killed. A dependant of the deceased claimed compensation from the managers of the school. The country court judge found that some of the boys were unruly

(1) 1914 Appeal Cases p. 667.

and badly disposed and that the deceased met his death by accident arising out of and in the course of his employment. It was held (1) that the death was caused by accident, and (2) that there was evidence to support the finding of the arbitrator that the accident arose out of the employment." But it may be noted, as VISCOUNT HALDANE, L. C. pointed out (at p. 673 of the Report) that there was evidence in the case that the assault was premeditated and the outcome of a conspiracy among some of the boys to injure the school master, who had punished or threatened to punish them, and who on the occasion in question was remonstrating with them. In the instant case similar evidence is lacking and there is nothing to connect the murder of the deceased with the workers in the D. L. W. so as to warrant the inference that the accident arose out of the employment.

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The same principle has been approved by our Supreme Court in recent decisions some of which may be noted. In *B. E. S. T. Undertaking v. Mrs. Agnes* (1), the facts were that the workman who was employed as a bus driver in the Undertaking finished his work for the day at about 7.45 p.m. at Jogeshwari Bus Depot. After leaving the bus in the depot, he boarded another bus in order to go to his residence at Santa Cruz. The said bus collided with a stationary lorry parked at an awkward angle on Ghodbunder Road near Erla Bridge, Andheri. As a result of the collision the workman was thrown out on the road and injured. He was removed to hospital for treatment where he succumbed to his injuries. His widow filed an application in the Court of the Commissioner for Workmen's Compensation, Bombay claiming compensation. The Commissioner dismissed the application. On appeal the High Court of

(1) A.I.R. 1964 S.C. 198.

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Bombay allowed the claim and passed a decree in favour of the widow. Hence, an appeal was preferred in the Supreme Court on behalf of the B. E. S. T. Undertaking. The evidence in that case was to the effect that in order to afford facility to the bus drivers employed in the Undertaking and enabling them to attend to their duties punctually they were provided on behalf of the Undertaking free transport in any of the numerous buses owned by the Undertaking. SUBHA RAO, J. observed—

“As the free transport is provided in the interest of service, having regard to the long distance a driver has to traverse to go the depot from his house and *vice versa*, the user of the said buses is a proved necessity giving rise to an implied obligation on his part to travel in the said buses as a part of his duty. He is not exercising the right as a member of the public, but only as one belonging to a service.”

Thus, it was emphasised that on the facts of the case it was evident that the facility was given “in the course of employment”; it was virtually the duty of the employees in the interest of service to utilise such buses both for coming to the depot and going back to their homes. In these circumstances it was held that when a driver while going home from the depot or coming to the depot used the bus and any accident happened to him, it must be deemed to be an accident in the course of the employment. The basis of the whole decision was that the workmen drivers were given that facility not as members of the public but as employees. Therefore, the Supreme Court held that the workman’s widow was entitled to compensation. It is manifest that an intimate relationship between the accident and the course of the employment was established in that case.

The same principle was endorsed by the Supreme Court in *M. Mackenzie v. I. M. Issak* (1). In para 5 of the reports RAMASWAMI, J observed—

“There must be a causal relationship between the accident and the employment.”

He added—

“The expression ‘arising out of employment’ is again not confined to the mere nature of the employment. The expression applies to employment as such—to its nature, its conditions, its obligations and its incidents.”

In my opinion the addition of these words does not militate against the former observation which underlines the causal relationship between the accident and the employment. On the other hand, it reinforces the same.

Applying the above *dictum* to the facts of the present case I find absolutely no material which may reflect any intimate relationship between the death of the workman and the course of his employment

It is also necessary to examine the consequences of the proviso to s 3(1) of the Act. It runs as follows:

“Provided that the employer shall not be so liable—

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days ;

(b) in respect of any injury, not resulting in death, caused by an accident which is directly attributable to—

(1) A.I.R. 1970 S C 1906,

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(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen,

(iii) the wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen."

Cl. (b) of the proviso in substance provides that if the personal injury results in the death of the workman, the employer will be liable, even though the workman may himself have contributed to the accident by being under the influence of drink or drugs or by wilfully disobeying security measures or removing security devices. From this in my opinion it is not correct to spell out a legislative intent to widen the scope of the employer's liability. The substantive provision which prescribes the criterion for the employer's liability for compensation is cl. (1) of s. 3 of the Act. The proviso does not enlarge the area of such liability, much less does it create any new liability. On the contrary, it restricts the scope of the employer's liability in certain situations and at the same time provides that in certain other situations the scope of the liability would not be abridged. The ultimate effect of the proviso is either to curtail or not curtail the extent of the liability created by s. 3(1). It cannot obliterate the basic condition which must exist, viz., a reasonable nexus between the accident and the employment. Even where a workman by his own action such as drunkenness, etc. contributes to his death, the

employer becomes liable provided that at the time of the accident the workman was performing the duties of his employment and the accident occurred because he chose to discharge those duties. If he had refrained from discharging such duty, the occasion for the accident would not have arisen. Therefore, there is a fundamental connection between the accident and the employment and the former can be deemed to have arisen out of employment. But where this primary causal connection is absent, no liability can be fastened upon a employer by virtue of the proviso to s. 3. In other words, the proviso merely provides where the contributory cause afforded by the workman himself would disentitle him from claiming compensation and where it will not so preclude him. The proviso simply rules out what in its absence would have been extenuating circumstances *qua* the liability of the employer.

In any case the proviso does not enlarge the ambit of the central provision contained in cl. 1 of s. 3. A personal injury to a workman may result in death or disablement for a period exceeding three days or it may not have any of these two results. Assuming for a moment that there was no proviso to the section. In that case if the accident (of either kind referred to above) occurred in the course of and arising out of the employment, the employer shall be liable and the circumstances enumerated in (i), (ii) and (iii) of cl. (b) of the proviso would be immaterial. The effect of the proviso is to partially restrict that liability, i.e., in cases where there is death or disablement for a period exceeding three days. The factors mentioned in (i), (ii) and (iii) would become material in restricting the liability to cases where the injury results in death.

The normal rule of construction with regard to a proviso is that it must *prima facie* be limited in its opera-

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tion It cannot be treated as if it were an independent enacting clause instead of being dependent on the main enactment. It is foreign to the proper function of a proviso to read it as a substantive provision save in very exceptional cases. As Lord WATSON said in *West Derby Union v. Metropolitan Life Assurance Society* (1) "I am perfectly clear that, if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso". The principle laid down by the House of Lords in the above decision was that arguments from a proviso which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive enactment. The rule is thus stated in *Graies "On Statute Law"* (sixth edition) at p 217—

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

"When one finds a proviso to a section 'said LUSH, J. in *Mullins v. Treasurer of Surety* (2) the natural presumption is that, but for the proviso, enacting part of the section would have included the subject-matter of the proviso."

In *S. B. K. Oil Mills v. Subhash Chandra* (3) (at p. 1600) Hidayatullah, J. ruled—

"The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment to qualify or create an

(1) (1897) A.C. 647.

(2) (1880) 5 Q.B.D 170, 178.

(3) A.I.R. 1961 S.C. 1698.

exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule."

Therefore, proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect. Sub-s. (1) of s. 3 of the Workmen's Compensation Act expressly enunciates the fundamental condition for creating the liability for payment of compensation. It is not ambiguous, much less absent in the substantive enactment, hence the proviso must be interpreted as reinforcing the same.

To me it appears to be of no consequence that the same phrase "arising out of and in the course of his employment" occurs in another enactment (the Employees' State Insurance Act, 1948) relating to employees in factories, establishments etc. S. 2(8) of that Act defines an employment injury to mean a personal injury to an employee caused by an accident or an occupational disease *arising out of and in the course of his employment* in a factory or establishment to which this Act applies. But the adoption of the same language in more than one statute is not a legitimate ground for giving an extended or wider meaning to those words. If other relevant considerations under an Act incline in favour of a restricted construction, the same must be applied. It is irrelevant that the adoption of a liberal interpretation of certain phraseology in a plurality of statutes has the potentiality of conferring more extensive benefits on a sizeable section of society. The desire to assist the workman in distress should not lead to a stretching of the language of the statute. No doubt, the mandate of the Constitution in Art. 38 is to build a welfare society in which justice, social, economic and political shall inform all the institutions of our national life. Never-

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theless, in my opinion the broad sweep and generalization and emphasis on social objectives must yield place to a more legalistic approach in the field of industrial jurisprudence.

I would, therefore, dismiss this appeal but make the costs easy.

K. N. SETH, J.:—This appeal by the claimant in a case under the Workmen's Compensation Act (Act no. VIII of 1923) (hereinafter referred to as the Act) has been referred to the Full Bench in view of the importance of the legal questions raised in the case.

The husband of the appellant was employed as Works Supervisor (Maintenance) in the Diesel Locomotive Works Projects (hereinafter referred to as the D. L. W.). On June 4, 1967 he was called for duty in the morning although that was his rest day. While going to the D. L. W. in the morning, he was murdered by some unknown assailant at about 7.30 a.m. near the grain godown. A claim for Rs.8,000 as compensation was preferred by the appellant. It was asserted that the deceased was attacked because of his strictness in supervision and taking of work and report for action against certain workers

The claim was contested by the respondent. It was admitted, that the deceased was employed as a works supervisor and was murdered on 4th June, 1967 while coming to the D. L. W. It is also not in dispute that the pay of the deceased was Rs.285.50 p.m. It was, however, denied that the personal injury in this case was caused by accident arising out of and in the course of employment. It was further asserted that he was murdered because of personal enmity with certain persons.

The Workmen's Compensation Commissioner by his order, dated 28th June, 1968 dismissed the claim of the

appellant holding that the accident did not arise out of and in the course of the employment of the deceased in the D. L. W.

The question that arises for consideration in this appeal is whether the accident arose out of and in the course of employment within the meaning of s. 3 of the Act which runs as follows:

“(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter”

It is well-settled that to enable a claimant to come within the Act, the injury by accident must arise both out of and in the course of employment. The words “arising out of and in the course of his employment” are *pari materia* with those found in the corresponding section of the English statute. The phrase “in the course of employment” refers to the time during which employment continues. A narrow meaning was given to these words by the earlier English cases, but subsequent decisions have widened its scope. It is no longer correct to say that the employment commences when the employee reaches his place of work and ceases when he leaves the place. It is unnecessary to refer to the various decisions in England as the theory of notional extension of time and place has been recognised by the Supreme Court in the case of *Saurashtra Salt Manufacturing Co. v. Bai Valu Raja* (1). It was observed—

“As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is

(1) A.I.R., 1953 S.C. 881.

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now well-settled, however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension."

It was, however, emphasised in the aforesaid case "that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him". The facts of the case were that in order to reach the place of employment one had to cross a creek on boat and after traversing the sandy area one could reach the salt jetty of the appellant company. On the day in question a boat carrying certain workmen employed by the appellant company met with an accident while crossing the creek and some workmen were drowned. Applying the theory of notional extension, their Lordships held that when the workman left the premises of the employer and reached the bank of

creek for crossing over to the other side and met with the accident while crossing the creek it could not be said that the accident happened in the course of employment. The question was again considered by the Supreme Court in the case of *General Manager of B. E. S. T. Undertaking v. Mrs. Agnes* (1). SUBBA RAO, J. delivering the majority judgment after considering a large number of English cases, observed—

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“The question, when does an employment begin and when does it cease, depends upon the facts of each case. But the courts have agreed that the employment does not necessarily and when the “down tool” signal is given or when the workman leaves the actual workshop where he is working. There is a notional extension at both the entry and exit by time and space. The scope of such extension must necessarily depend on the circumstances of a given case. As employment may end or may begin not only when the employee begins to work or leaves his tools but also when he used the means of access and agrees to and from the place of employment. A contractual duty or obligation on the part of an employee to use only a particular means of transport extends the area of the field of employment to the course of the said transport. Though at the beginning the word ‘duty’ has been strictly construed, the later decisions have liberalized this concept. A theoretical option to take an alternative route may not detract from such a duty if the accepted one is of proved necessity or of practical compulsion.”

In the aforesaid case the Supreme Court, after discussing the terms of employment of the workman, came to the conclusion that the right to travel in the bus in order to discharge his duties punctually and efficiently was a

(1) A.I.R. 1964 S.C. 193

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condition of his service and on that basis came to the conclusion that when a workman going home from the depot or coming to the depot uses the bus any accident that happens to him is an accident in the course of his employment. It is thus clear that the theory of notional extension of time and place is not unlimited in its scope and would depend on the circumstances of each case. As observed by Lord PORTER in *Weaver v. Tredgar Iron and Coal* (1) "the question is not, I think whether the man was on the employer's premises. It is rather whether he was within the sphere of area of his employment". Lord PORTER further observed—

"It is in the course of his employment, and, if the phrase be used, it is part of his duty, both to go to and to proceed from the work upon, which he is engaged, and, so long as he is in a place in which persons other than those so engaged would have no right to be, and indeed, in which he himself would have no right to be but for the work on which he is employed, he would, I think, normally still be in the course of his employment."

In the present case it is not disputed that the workman was on his way to join his duty and he met with an accident at a place which was within the jurisdiction of the D. L. W. It is clear that but for his employment the workman would not have been at that place. Applying the theory of notional extension it may be held that the workman met with the accident in the course of his employment.

It is, however, not enough that the accident took place in the course of employment and it must be further established that it arose out of the employment.

(1) (1940) 3 All E.R. 157 at p. 179.

The words 'out of' and 'in the course of employment' are used conjunctively and not disjunctively. As observed by Lord WRIGHT in *Dover Navigation Co. Ltd. v. Cragge* (1) "What arises 'in the course' of the employment is to be distinguished from what arises 'out of the employment'. The former words relate to time conditioned by reference to the man's service, the latter to casuality. Not every accident which occurs to a man during the time when he is on his employment—that is, directly or indirectly engaged on what he is employed to do—gives a claim to compensation, unless it also arises out of the employment".

The expression 'arising out of the employment' was explained by Lord SHAW in the leading English case of *Thom (of Simpson) v. Sinclair* (2) thus—

"In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment'. The expression in my opinion applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb v. Codden Flour Mills Company* (3) and *Barnes v. Nunnery Colliery Company* (4) in this House, then a case for compensation under the statute appears to arise."

In this case a woman employed by a fish-curer, while working in a shed belonging to her employer, was injured by a fall of the wall which was being built on

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(1) (1939) 4 All. E.R. 558.
(3) (1914) A.C. 62.

(2) 1917 A.C. 127.
(4) (1912) A.C. 44.

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an adjacent building with the result that the shed collapsed and the woman was buried under the wreckage. Applying the test laid down by Lord SHAW it is obvious that the employee was brought within the zone of special danger due to her employment and the House of Lords, therefore, held that the accident arose out of her employment and was entitled to compensation.

It is not necessary to multiply citation of English cases except to refer to the speech of Lord TOMLIN in *Simpson v. London, Midland and Scottish Railway Company* (1) wherein the Law Lord, reviewing previous authorities on the unexplained accident cases, stated—

“ Where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment ; ”

In the same case Lord THANKERTON observed—

“ . . . the principle to be applied in such cases is that if the accident is shown to have happened while the deceased was in the course of his employment and at a place where he was discharging the duties of his employment, and the accident is capable of being attributed to a risk which is ordinarily inherent in the discharge of such duties, the Arbitrator is entitled to infer, in the absence of any evidence tending to an opposite conclusion, that the accident arose out of the employment.”

(1) (1981) A.C. 351.

This question has been considered by the Supreme Court in the case of *Mackinnon Mackenzie and Co. Private v. Ibrahim Mahommad Issak* (1) wherein RAMASWAMI, J speaking for the Court observed—

“To come within the Act the injury by accident must arise both out of and in the course of employment. The words ‘in the course of the employment’ mean ‘in the course of the work which the workman is employed to do and which is incidental to it’ The words ‘arising out of employment’ are understood to mean that during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered’. In other words, there must be a casual relationship between the accident and the employment. The expression ‘arising out of employment’ is again not confined to the mere nature of the employment. The expression applies to employment as such—to its nature, its conditions, its obligation and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger, the injury would be one which arises ‘out of employment’. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act.”

The Supreme Court quoted with approval the following observation of Lord SUMNER in *Lancashire and Yorkshire Rly. Co. v. Highley* (2):

(1) A.I.R. 1970 S.C. 1906.

(2) (1917) A.C. 882.

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"There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the Statute, and it is generally of some real assistance. It is this. Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because, what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of this was within the sphere of the employment or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment, that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

In the case before the Supreme Court the facts were that the deceased was employed as a deck-hand, a seaman of Category II on the ship. On December 13, 1961 he complained of pain in the chest, but nothing abnormal was detected clinically. He was prescribed some tablets and the employee reported fit for the work on the next day. On the 15th he complained of insomnia and pain for which he was prescribed some sedative tablets. The Official Log Book of the ship shows that on 16th when the ship was in the Persian Gulf the deceased was seen near the bridge of the ship at about 2.30 a.m. He was sent back but at 3 a.m. he was seen on the Tween Deck when he told a seaman on duty that he was going to bed. At 6.15 a.m. he was found

missing and a search was undertaken. The dead body, however, was not found either on that day or later on. It was a normal night and the Commissioner, who made a local inspection of the ship, saw the position of the bridge and deck and found that there was bulwark more than $3\frac{1}{2}$ feet. On these facts the Supreme Court, upsetting the judgment of the High Court, ruled that there was no material for holding that the death of the seaman took place on account of the accident which arose out of his employment. The test applied was that there was no casual relationship between the accident and employment.

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Learned counsel for the appellant has relied upon a decision of this Court in *Works Manager, Carriage and Wagon Shop, E. I Rly. v. Mahabir* (1). In this case a workman, who lived in a village close to Malhaur Railway Station, used to come free of cost to Lucknow junction every morning from Malhaur along with other employees in a Workmen's Special provided by the railway and proceed after crossing the lines to the Alambagh Workshop which was at a distance of about a mile from the junction across the railway yard. This route was taken as a matter of routine for going to and coming from the works in preference to a sub-way and two other overbridge routes which were also available. On the day of accident the workman finished work at 5.30 a.m. and was returning as usual to the Lucknow Junction Station over the yard in order to catch the passenger train which left there at 8 a.m. for Malhaur. When he was within a short distance of the station platform, he was run over by a shunting engine at about 6.30 a.m. As a result of the accident his legs were crushed and they had to be ultimately amputated. In this case MISRA, J. with whose opinion SAPRU, J. concurred, held that the accident arose out of the

(1) A.I.R. 1964 All. 192.

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employment. It may be noticed that in this case there was causal relationship between the accident and the employment. It was established that in order to catch the special train provided by the railway the workman used the shorter route which was taken as a matter of course and but for his employment and the facility provided by the railway for the workman, he would not have been at the place where he met with the accident. The use of the special train by the workman could be said to be one of the terms of his employment. Such circumstances leave no room for doubt that the accident took place in the course of his employment. The case would come within the principle laid down by the Supreme Court in *General Manager B. E. S. T Undertaking v Mrs. Agnes* (1)

The learned counsel placed strong reliance on the case of *Bhagubai v. General Manager, Central Railway* (2). In the aforesaid case the deceased was employed in the Central Railway at a station and he lived in the railway quarters adjoining the railway station. The only access for the deceased from his quarter to the railway station was through the compound of the railway quarters. One night the deceased left the quarter in order to join the duty and was stabbed by some unknown person. There was no evidence that the employee was done to death because some one was interested in murdering him. CHAGLA, C. J. after quoting the principles laid down in *Thom (or Simpson) v Sinclair* (3) held that the accident arose out of the employment of the deceased that he found himself at a spot where he was assaulted and murdered. In this case it was observed that once the claimant had established that the deceased was at a particular place and he was there because he had to be there because of the reason of his employment, and he further established that be-

(1) A I R. 1964 S.C. 198.

(3) 1917 A.C. 127.

(2) A I R. 1955 Bom. 105.

cause he was there he met with an accident, a casual connection between the accident and the employment was established. In the opinion of the learned Judge the law did not place the additional burden upon the claimant to prove that the accident which arose because of that peril was not personal to him but was shared by all the employees or the members of the public and once a proximate connection is established between the employment and the injury, the claimant has discharged the burden and the proximate connection between the employment and the injury was the fact that the deceased was at a particular spot in the course of his employment and it was at that spot that he was assaulted and done to death. With respect, it is not possible to agree with this broad proposition. The mere fact that the workman was stabbed to death by some unknown person while he was on his way to join his duty would not establish a nexus between the accident and employment. It may establish that he was done to death in the course of his employment, but it is difficult to hold that the accident arose out of the employment. As laid down in *Powell v Great Western Railway Co.* (1) it must be shown that the injury caused was due to the fact that the workman was specially exposed to such peril because of his employment or that the injury was due to some special risk that the workman had to undergo. In the Bombay case there was no such evidence that the injury was due to some special risk the workman had to undergo or that the workman was specially exposed to such peril because of this employment.

In the case in hand there is absolutely no evidence as to who caused the murder and what was the motive behind it and it is also not known that there was any risk which was ordinarily inherent in the discharge of

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the duties of the deceased. It is also not established that the workman was exposed to some special risk at the place where the accident took place. In the absence of any such evidence it is not possible to attribute the accident to any such risk and to hold that the accident arose out of the employment. In fact there is no evidence to connect the death of the workman with his employment. He might have been killed by a person out of personal animosity wholly unconnected with his employment. The evidence on record has several missing links and in the absence of any reliable evidence, it would be unsafe to reach a conclusion that the murder had any connection with the employment of the deceased or in other words it arose out of the employment.

Bhagubai's case (1) was also relied upon for the contention that once it was established that the deceased was a workman and he met with an accident during the course of his employment, the claimant has discharged the burden and it was for the employer then to establish that either the peril was brought about by the employee himself, that he added or extended the peril, or that the peril was not a general peril but a peril personal to the employee. Here again CHAGLA, C. J. laid down too wide a proposition with which it is difficult to agree.

Dealing with the question of burden of proof Lord BIRKENHEAD, L. C. in *Lancaster v. Blackwell Colliery Co. Ltd.* (2) observed—

“If the facts which are proved give rise to conflicting inferences of equal degrees or probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to

(1) A.I.R. 1955 Bom. 105.

(2) 1918 W.C. & I.R. 345

prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the Arbitrator is justified in drawing an inference in his favour."

In *Mackinnon Machenzie and Co. Private Ltd. v. Ibrahim Mohammad Issak* (1) the Supreme Court stated the principle on burden of proof as follows:

"In the case of death caused by accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to court for relief must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant these essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference. It is of course impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it."

The principle laid down by these authorities appears to be that the burden of proof primarily rests on

(1) A.I.R. 1970 S.C. 1908.

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the workman to prove that the accident arose within the employment, but it is not necessary that there must be direct evidence to that effect. It is open to the court to draw such an inference from the facts brought on the record of the case if such an inference is legitimately possible. There must, however, be some material on record to lead to the inference that the accident was attributable to the employment of the workman.

Keeping in view these principles it may be noticed that in the present case all that the appellant has been able to establish is that the deceased was an employee of the respondent and that he met with an accident while on his way to join his duty. From the evidence of J. K. Mittal, who was the Senior Civil Engineer of the respondent at the relevant time, it is clear that the deceased was found lying dead near the grain godown. This godown was not within the area of D.L.W. but adjoined it and was in the way to D.L.W. He, however, admitted that the place where the workman was found lying dead was within the jurisdiction of the D.L.W. Zakir Husain, father of the deceased, stated that his son was murdered at a place which fell on the route to D L W. He, however, admitted that he could not give any reason for the murder of his son. Apart from the statements of these two witnesses, there is no other evidence on record.

It is admitted that no report about the murder was lodged with the police. As observed earlier, there is absolutely no evidence regarding the motive of person or persons behind the murder. No special risk ordinarily inherent in the discharge of the duties of the deceased or place where the accident took place has even been hinted at. In absence of these materials it is not possible to connect the death of the workman

with his employment. As such, the claimant has miserably failed to establish any proximate connection between the accident and the employment of the deceased and there is no material on record from which an inference could be drawn to that effect.

The appeal has no merits and is accordingly dismissed. The parties shall bear their own costs.

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BY THE COURT

In view of the majority opinions the appeal is dismissed but without any order as to costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice G. C. Mathur on difference of opinion between Mr. Justice S. Chandra and Mr. Justice Trivedi.

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Bengal Regulation, 1822—Settlement with inferior proprietor—Right of superior proprietor not extinguished.

Under the Bengal Regulation, 1822 even though the settlement was made with the inferior proprietor it did not extinguish the right of the superior proprietor. The second settlement was made under N. W. P. Land Reforms Act, 1873 and under s 53 of the Act the position was identical. This Act also kept alive the superior proprietary rights even though the settlement was made with the inferior proprietor. Therefore,

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in both the settlements the rights of the superior proprietor were specially kept alive.

Malikana allowance—*Whether by way of compensation of the proprietary right and determines under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act.*

Per G. C. MATHUR, J. (On difference of opinion between S. CHANDRA, J. and TRIVEDI, J.): The Malikana allowance was not by way of compensation for acquisition of his proprietary right and did not determine under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act.

The Malikana was paid by the inferior proprietor to the superior proprietor in respect of his proprietary rights and the allowance was not compensatory one for the acquisition of the rights of the Raja.

Special Appeal no. 965 of 1967 against the order of S. D. KHARE, J., dated August 25, 1967.

B. N. Asthana, B. P. Singh, Rajeshwari Pd. and S. Prakash, for the Appellant.

S. C. for the Respondents.

G. C. MATHUR, J.:—In view of the difference of opinion between S. CHANDRA, J. and J. S. TRIVEDI, J., the following questions has been referred for opinion to me:

“On the facts and circumstances of the case, was the Malikana allowance granted to the appellant as compensation for acquisition of his proprietary title in the 135 villages?”

The circumstances, in which the question arises, are as follows: The appellant and his ancestors, the Rajas of Daiya, were the Taluqdars of Taluq Daiya in pargana Khairagarh, district Allahabad. It appears that, in the beginning of the nineteenth century or at the end of the eighteenth century, pargana Khairagarh fell into arrears and was taken over by the Raja of Banaras who made it over to one Lal Odwant Singh.

Lal Dokal Singh, son of Lal Drigpal Singh, the Raja of Daiya, instituted a suit for the declaration of his rights and for possession over Taluqa Daiya. After about 27 years of litigation, by a decree of the King in Council, the suit was decreed, as a result of which Lal Dokal Singh obtained possession of Taluqa Daiya in 1837. About this time when Lal Dokal Singh obtained possession, settlement proceedings under Regulation VII of 1822, as modified by Regulation IX of 1833, were going on. The settlement proceedings were being conducted by Mr. R. Montgomery, officiating Collector, Allahabad. He found that, in some of the villages of Taliqua Daiya, there were inferior proprietors known as Moquddams whilst, in other villages, there were no such inferior proprietors. In his report dated, October 8, 1838 (Ann. 'A' to the counter-affidavit), Mr. Montgomery recommended that, in those villages where there were Moquddams, the settlement for payment of revenue be made with the Moquddams and, in the village where there were no inferior proprietors, the settlement for payment of revenue be made with the Rajas. This was accepted. Accordingly, in 135 villages, some of which lay in the district of Mirzapur but were subject to the settlement proceedings, the settlement for payment of revenue was made with the Moquddams or inferior proprietors and a Taluqdari allowance or Malikana was fixed for the Raja at 18 per cent of the revenue. The Moquddams or inferior proprietors were required to deposit the revenue and over and above the revenue an amount equal to 18 per cent of the revenue in the Government treasury. This 18 per cent was paid to the Raja as Taluqdari allowance or Malikana. Subsequently, the allowance was reduced to 10 per cent of the revised revenue. A second settlement took place in 1876-77 and the same arrangement of settlement with the Moquddams for payment of revenue and for

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payment of Taluqdari allowance or Malikana to the Raja was continued. The payment of the Malikana continued to be made till the U. P. Zamindari Abolition and Land Reforms Act, 1951, came into force. The payment of Malikana was stopped by the Government with effect from July 1, 1952, on the ground that the allowance was in respect of the proprietary rights of the Rajas in the 135 villages and it determined under s. 6(b) of the Act.

The main ground, on which the stoppage of the payment of Malikana by the State Government is challenged, is that the Malikana was paid for the acquisition of the rights of the Raja of Daiya in the 135 villages and, therefore, it was not a right in respect of any interest in those villages which could be determined under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act. The case set up by the State in opposition to this is that the proprietary rights of the Raja Daiya were not acquired in the settlement proceedings and that the Taluqdari allowance or the Malikana was a payment towards dues in respect of the proprietary interest of the Raja in the 135 villages. The learned Single Judge, before whom the writ petition came up for hearing, was of the view that the right to Malikana in the present case was the right of the superior proprietor to receive 10 per cent of the land revenue from the inferior proprietor through the State and was a right or privilege in respect of the land or its land revenue. He accordingly held that this right was determined under cl. (b) of s. 6 and dismissed the writ petition. The petitioner preferred a special appeal. The special appeal was heard by a Bench consisting of S CHANDRA and TRIVEDI, JJ. S. CHANDRA J. was of the view that the appellant's case that the Malikana allowance was paid as compensation for acquiring the

Taluqdar's title was not correct. According to him, by making provision for the payment of Malikana the Government recognised the right of the Raja to receive an allowance from an inferior proprietor and that the payment was secured to the advantage of the Raja by the arrangement that the inferior proprietor will pay to the State Government and the State Government will then pay it to the Raja. He was accordingly of the opinion that the appeal should be dismissed. TRIVEDI, J. was of opinion that the Malikana allowance was paid to the Rajas in lieu of their lost proprietary rights and, therefore, the allowance did not determine under s. 6(b) of the U. P. Zamindari Abolition and Land Reforms Act. On account of this difference of opinion, the Bench referred the abovementioned question for opinion to a third Judge.

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Sri *Rajeshwari Prasad*, learned counsel for the appellant, has argued the case before me at length. On his arguments, the following three questions arise for consideration :

(i) Whether, in the settlement proceedings, the proprietary rights of the appellant's ancestor were acquired by the Government and whether he was given the Malikana allowance in lieu of the acquired rights?

(ii) Whether, in view of the decision of the Supreme Court in the *State of Bihar v. Maharaja Pratap Singh Bahadur* (1), the Malikana allowance in the present case cannot but be held to be in lieu of the acquisition or extinction of proprietary rights of the appellant's ancestors ; and

(iii) Whether, on the settlement being made with the inferior proprietor, the proprietary rights

(1) A.I.R. 1969 S.C., 164.

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of the superior proprietor must necessarily come to an end?

In the *Government of the State of Uttar Pradesh v. Kunwar Sri Trivikram Narain Singh* (1), the Supreme Court held that an allowance granted by the Government to a proprietor for the abandonment of his rights in certain *mahals* was not in respect of land or its land revenue and could not be extinguished by operation of s. 6(b) of the U P. Zamindari Abolition and Land Reforms Act. In order to bring his case within the dictum of the Supreme Court, the appellant asserted in paras. 5 and 6 of the writ petition as follows:

"5. That 135 villages of Raja of Daiya were acquired by Regulation no. 7 of 1822 of the Bengal Regulations and in the settlement of 1838-39, the lands of those villages were settled with the resident communities of the villages and Raja ceased to have any proprietary interest in those villages.

6. That after the settlement of 1838-39, the Raja was granted a Malikana allowance of Rs.3,344-4 per annum from the Government for the villages of the Allahabad District and Rs.414 per annum for the villages of Mirzapur District."

The case set up by the appellant is that, by virtue of the settlement proceedings, the proprietary rights of the Raja of Daiya were acquired or extinguished and, in lieu thereof, a Malikana allowance was fixed. Settlement proceedings are not concerned with the acquisition or extinction of the rights of the existing proprietors. Such proceedings are for the purpose of assessing land revenue and for engaging with proprietors for payment thereof. In such proceedings, the existing rights in land are ascertained but no new rights are created

(1) A.I.R. 1968 S.C. 799.

and no old rights are extinguished. Bengal Regulation VII of 1822 was framed for the purpose of taking settlement proceedings in certain areas. From the long title and the preamble to the Regulation it is apparent that the object of the Regulation was to declare principles for making the settlement and to define, settle and record the rights and obligations of various classes and persons possessing an interest in the land. The regulation was not concerned with the acquisition or extinction of the existing rights or titles. It was under this regulation that Mr. Montgomery made the settlement in pargana Khairagarh which included the Taluqa of Daiya. As already stated above, he found that, in 135 villages of the Taluqa, the Raja was the superior proprietor and the Moquddams were the inferior proprietors. Settlement in respect of such land was governed by s X, First Part, of the Regulation. This provided—

“X. *First*—Of several parties possessing separate heritable and transferable properties in any parcel of land, or in the produce or rent thereof, such properties consisting of interests of different kinds, it shall be competent to the Governor-General in Council to determine and direct which of such parties shall be admitted to engage for the payment of the Government revenue; *due provision being made for securing the rights of the remaining parties.* It is further hereby declared and enacted, that it is and shall be competent to the Governor-General in Council, in confirming the settlement of any mehaul in perpetuity, or for a term of years, to determine and prescribe the manner and proportion in which the net rent or profit arising out of the limitation of the Govern-

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ment demand shall be distributed among the different parties possessing an interest in the lands appertaining to such mehaul, or in the rent or produce of such lands or mehaul."

In accordance with this provision, settlement for the payment of land revenue was made with the inferior proprietors or Moquddams. In the initial report made by Mr. Montgomery to the Commissioner on October 8, 1938, he has made certain observations which are relevant to the present question. He has observed—

"The principle of making the settlement with the Macquddams or heads of the villages has been recognised in all cases, where proprietary communities are found to exist; their existence is, I think, here found with a right of management and occupancy in the different village communities, the Raja being the heir or Talookdar and as such of course entitled to his Talookdari allowance.

The third class consists of villages in which there are no communities and which are occupied by common cultivators; these I consider should be settled with the Raja as Zamindar as no person can show a better title than he can; whilst the 1st and 2nd classes, should, in my opinion, be settled directly with the Moccuddums, a Talookdari allowance being made to the Raja."

In respect of Taluqa Daiya, Mr. Montgomery observed in paragraph 15—

"The Talooka is not now in the Raja's possession, having lately been made over to Downkul Singh by a decree of the kind in Council.

The same state of things are found here as in the other Talookas regarding which I would propose exactly the same arrangement, giving Down-

kul Singh the Talookdary rights and where there are no Moccuddums or the villages are occupied by Guhrwars, making the engagement directly with him."

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The final report was submitted by Mr. Montgomery, after the settlement proceedings were over, on October 1, 1839. In paras. 31 and 32 he has stated—

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"31. The principle of making the settlement with the Mocuddums or village communities in all Talookdaree Estates, where such a state of things is found to exist, has most wisely for the happiness of many at the recommendation of Sudder Board, been recognised by Government. The existence of proprietary communities, with a right of management and occupancy, is here found in a more or less perfect state, according as the several communities had more or less power or influence to withstand the Rajah, he being considered the head or Talookdar, and as such of course entitled to his Talookdaree allowance, and nothing more.

32. In compliance, therefore, with the instructions I received dated 16th of October, I proceeded at once to make a detailed settlement with the village communities when they were found to exist, excepting however the Guhrwars or member of the Rajah's family, who had been permitted by him to hold the villages by favour, not by rights; in all such cases, as also when no communities were in existence, the settlement was made with the Rajah. In Mucuddamee estates an allowance of 18 per cent has been granted to the Rajah."

It is thus clear that the Taluqdari allowance which the Raja was entitled to receive from the inferior proprie-

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tors by virtue of his being the superior proprietor, was preserved and quantified and its payment was secured through the Government Treasury. This was done according to the direction in s X that due provision should be made for securing the rights of the other proprietors with whom the settlement was not made. The reports make it amply clear that the proprietary rights of the Raja or Taluqdar were not acquired or extinguished in the settlement proceedings. In fact, since the Taluqa had been restored to the Taluqdar only in 1837 by the decree of the King in Council, there was no occasion so soon thereafter to acquire or extinguish his rights. If the proprietary rights of the Taluqdar had been acquired or extinguished, then there would have been no question of payment of any amount by the inferior proprietor to the Taluqdar. The provision for the making of such a payment in the settlement, even though the payment was made through the Government Treasury, is consistent only with the continuance of the Taluqdar's rights and not with their extinction. It thus appears that, by this settlement, the Taluqdari rights of the Raja of Daiya were kept alive but the settlement was made with the inferior proprietors and provision was made for the payment by the inferior proprietors to the Taluqdar of a sum equal to 18 per cent of the revenue on account of Taluqdari rights.

The second settlement was made in 1876-77 under the provisions of the North-Western Provinces Land Revenue Act, 1873 (Act XIX of 1873). Chap III of this Act deals with settlement. S. 48 provides that, if the proprietor refuses to accept the settlement made, then he was to be excluded from the settlement and the *mahal* had to be formed out or held under direct man-

agement. In such a case, the person so excluded was entitled to an allowance out of the profits of the *mahal* of not less than five or more than fifteen per cent on the proposed assessment. S. 53 provided—

“53. Whenever several persons possess separate heritable and transferable proprietary interests in any mahal, such interests being of different kinds, the Settlement Officer may, under the rules for the time being in force, determine—

“(a) which of such persons shall be admitted to engage for the payment of the revenue, due provision being made for securing the rights of the others, and

(b) the manner and proportion in which the net profits of the *mahal* shall be allotted to the several persons possessing separate interests as aforesaid for the term of the settlement.”

In these settlement proceedings also, the settlement for the payment of revenue was made with the inferior proprietors and a Taluqdari allowance was fixed at 10 per cent of the revenue for payment to the Taluqdar. In the final settlement report published and printed in 1878, the Settlement Officer has described the Raja of Daiya as the Taluqdar or superior proprietor of the village settled with the Moquddams. - Para. 34 of the report, which dealt with Taluqdars or superior proprietors, reads thus—

“The former class has already been noticed. It exists but in the trans-Jumna, paiganas and was the result of Mr. Montgomery’s discovering village communities. On these he bestowed a proprietary

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title, granting to the Talukdar or superior proprietor a *malikana* allowance of 18 per cent on the rental assets. This allowance has now been reduced by orders of the Board and Government to 10 per cent on the revised assessment. This class of superior proprietors contains in this district three men only, the Rajas of Manda and Daiya in Khairagarh, and Manohar Das, purchaser of the rights of Bara Raja in Bara and Arail."

In the order confirming the report, it is stated in para. 10—

"In 531 *mahals* of the trans-Jumna parganas there are both superior and inferior proprietors. The former are three persons only, viz., the Rajas of Manda and Daiya and Manohar Das, purchaser of the rights of the Raja of Bara. The settlement of the land revenue has been made with the inferior proprietors; and the allowance payable by them to the superior proprietors having been fixed at 10 per cent on the revised land revenue and amounting in all to Rs 24,077, is paid by them alongwith the revenue into the Government Treasury whence it is disbursed to the superior proprietors."

The reports relating to the second settlement also show that, in respect of the 135 villages of Taluqa Daiya which were settled with the inferior proprietors, the Raja of Daiya continued to be the superior proprietor. The amount of 10 per cent of the land revenue, which was paid by the inferior proprietors, was in respect of the rights of the Raja as superior proprietor. The proceedings of this settlement also do not support the appellant's case that the rights of the Rajas of Daiya

in the 135 villages settled with the inferior proprietors were acquired or extinguished. On the other hand, they show that the rights of the superior proprietors were kept intact and the inferior proprietors were required to pay a sum equal to 10 per cent of the land revenue to the superior proprietors through the Government Treasury.'

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The case of the Raja of Bara, which was identical to that of the appellant, came up for consideration before this Court in a writ petition filed by Lalji Tandon, son of Manohar Das, purchaser of the rights of the Raja of Bara. The Malikana allowance payable to the Raja of Bara had been transferred to Manohar Das and was inherited by Lalji Tandon. This allowance was also stopped by the State Government under s 6(b) of the U. P. Zamindari Abolition and Land Reforms Act. He filed Writ Petition no 2838 of 1958 in this Court. The writ petition was allowed by a learned Single Judge but an appeal by the State Government (Special Appeal no. 248 of 1964) was dismissed by a Division Bench by its judgment, dated May 18, 1966. The Division Bench observed—

"It is also clear from this document that the payment that the Raja was receiving as *malikana* either in respect of *macuddumi* villages or in respect of those of which he was the sole proprietor was in the nature of his share in the assets of the villages and in recognition of his superior proprietary rights.

These paragraphs clearly show that the *malikana* was the '*talugdari* allowance' (superior proprietor's allowance), was connected with some villages, was fixed during settlement operations fiscal, i.e.,

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relating to the fixation of Jama or land revenue) and was not in the nature of pension or compensatory grant.

It also clearly shows that the Government was only an agency through which the *malikana* was paid to Manohar Das but the actual payment was made by the inferior proprietors."

The conclusion of the Bench was that the rights of the Raja were not acquired and that the *Malikana* was paid by the inferior proprietor to the superior proprietor in respect of his superior proprietary rights. The decision of the Division Bench is fully applicable to the present case and negatives the appellant's case of the allowance being a compensatory allowance for the acquisition of the rights of the Raja of Daiya in the 135 villages.

The second question is whether the word 'Malikana' has acquired a fixed meaning of an allowance in lieu of acquisition of proprietary rights and whether, for that reason, the origin of the allowance must be ignored. In *the State of Bihar v. Maharaja Pratap Singh Bahadur* (1), on which the appellant places reliance, the Supreme Court held—

"The proprietors of the Gidhaur Estate in Bihar are in receipt of a permanent *malikana* for over a century. The origin of this *malikana* allowance is not known. From time immemorial it has been customary in Bihar to pay a permanent *malikana* allowance to ex-proprietors in lieu of their lost proprietary right. Phillips in his *Law Relating to the Land Tenures of Lower Bengal*, pp. 144, 147, 269, said that the proprietors of the soil in Bihar univer-

(1) A I R. 1969 S.C., 164.

sally claimed and possessed a right of *malikana* and he endeavoured in vain to trace its origin in Bihar. The *malikana* right of the excluded proprietors in Bihar was acknowledged in the Regulations passed on August 8, 1788. At the time of Permanent Settlement, the new grantees were forced to acknowledge this right (*See* Baden-Powell, Land-systems of British India, Vol I pp. 516, 517). The Bihar Board of Revenue Misc. Rules, 1939, art. 342, p. 166 divides *malikana* into two classes. Malikana of the first class is for a term of years only, that is, during the currency of a settlement. Malikana of the second class is permanent. It states that 'the Bihar *malikana* falls under this class and is a compensation permanently granted to the proprietors. . . . It is of a pensionary nature and does not depend upon collections'. The permanent *malikana* is payable at the treasury on April 1, and October 1, every year on presentation of pay orders issued by the Collector accompanied by a life certificate of the recipient.

There can be no doubt that the *malikana* payable to the proprietors of the Gidhaur Estate is a permanent grant of money in lieu of their proprietary rights in lands originally held by them. The proprietors retained certain estates. On the publication of the notification under s 3 of the Bihar Land Reforms Act, 1950, the interest of the Maharaja in those estates, was extinguished. But the *malikana* payable to him is not an interest in those estates and did not cease on the issue of the notification."

This decision can be of no help to the appellant. In that case, the Malikana was a permanent grant and

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such a grant in Bihar was only in lieu of the lost proprietary rights. The position in the North-Western Provinces, which subsequently became the United Provinces, was quite different. There is nothing to show that, in U. P. also, the word 'Malikana' had acquired the same meaning. In the Land-systems of British India by Baden Powell, Vol. I, Malikana is dealt with at page 516. It is stated there—

"This term so often occurs in Bengal (and indeed in all revenue literature) that I may take this opportunity to explain it.

The revenue responsibility being on the land, Government is entitled to exclude the proprietor who refuses what the authorities deem a reasonable assessment, but in such cases it grants a '*malikana*', or exproprietary allowance, to support the recusant during the period of his exclusion. This is not less than five or more than ten per cent on the revenue.

But the term *malikana* has also a wider application: it refers to any portion of the produce, or payment made in acknowledgement of a proprietary, or more commonly an ex-proprietary, right or title. It is well illustrated in Bihar; there the villages appear in many cases to have come under the landlord claims of men who were leaders of troops and minor chiefs, or cadets of noble families, who so often, as we have already seen, established themselves as landlords over single villages and small estates. Small owners of this class cannot make terms with later conquerors, as large estate-holders can; and it came to pass that, under the Muhammadan rule, such petty landholders were displaced either by Muhammadan jagirdars, who got grants over their heads, so to speak, or by other minor grantees (*lakhirajdars*); further, under

our own earlier revenue system, the country was framed to outsiders, and in the end of the newcomers had got so firmly fixed that the Permanent Settlement was made with them. But such is the force of custom, that the new grantees, and farmers, were always obliged to recognise the older ousted proprietors by making them a '*malikana*' allowance. When our Government resumed a number of the *lakhiraj* estates and assessed them to revenue and settled with the present holders, the estate was often charged with paying the '*malikana*' to the ousted proprietor."

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From this it appears that the word '*Malikana*' did not have the same meaning everywhere and it was used also in the sense of an allowance payable to the superior proprietor. In the Supreme Court case itself, in dealing with the *Malikana* allowance under Bengal Regulation VII of 1822 and the North-Western Provinces Land Revenue Act, 1873, it was observed by the Supreme Court:

"The *malikana* was for a term of years when the proprietors were dispossessed from management temporarily. It was a permanent grant when the proprietors' rights in their lands were completely extinguished."

The *Malikana* allowance in the present case was of the first kind. Both under Bengal Regulation VII of 1822 and the North-Western Provinces Land-Revenue Act, 1873, the settlement of land revenue with the inferior proprietors was for a temporary period till the next settlement was made. It was certainly not a permanent grant in lieu of the extinction of the rights of the proprietor. Therefore, in my opinion, even though the allowance fixed under the two settlements for payment

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to the superior proprietor was called a Malikana allowance, it is not possible to hold that it was in lieu of the extinction of the proprietary rights of the Taluqdar or Raja. Even if it could be held that the word 'Malikana' had acquired a fixed meaning of an allowance paid for acquisition of proprietary rights, the use of the word 'Malikana' in the present case would not be conclusive. If the origin of the allowance is known, then the nomenclature given to the allowance is immaterial. The nature of the allowance must, in such a case, be gathered from its origin and history. In the case before the Supreme Court, the origin and history of the allowance were not known and, therefore, since a permanent Malikana had always been in lieu of acquisition of proprietary rights, the permanent Malikana given to the Maharaja was also held to be of the same nature. Once the origin history of the allowance are known, they cannot be ignored and the question as to the nature of the grant must be determined on that basis.

The third question is whether, merely on account of the Raja of Daiya being excluded from settlement, his proprietary rights must be deemed to have been extinguished. The earlier settlement was made under Bengal Regulation VII of 1822. S. X, First Part, clearly provided that the settlement may be made with the inferior proprietor, keeping intact the right of the superior proprietor to receive his dues from the inferior proprietor. Therefore, under Bengal Regulation VII of 1822, even though the settlement was made with the inferior proprietor, it did not extinguish the rights of the superior proprietor. The second settlement was made under the North-Western Provinces Land-Revenue Act, 1873. Under s. 53 of this Act also the position was identical. If a settlement was made with the inferior proprietor, then due provision had to be made for securing the

rights of the superior proprietor. This is exactly what was done in the settlement, the settlement being made with the Moquddums and provision was made for the payment of a Taluqdari allowance or a Malikana allowance by the inferior proprietor to the superior proprietor. This Act also kept alive the superior proprietary rights, even though the settlement was made with the inferior proprietor. Therefore, in both the settlements, the rights of the superior proprietor were specifically kept alive.

Learned counsel for the appellant relied upon the decision of a Single Judge of this Court in *Bhagwan Das v. Manohar Lal* (1). It was held in this case that, where a person did not refuse settlement under the North-Western Provinces Land Revenue Act, 1873, but was excluded therefrom and allowed a Malikana allowance in recognition of the proprietary rights which he had originally possessed, his proprietary rights were thereby lost and he became the ex-proprietary tenant of the *sir* land which he had held as proprietor. An examination of the facts of this case reveals that one Data Ram was a *zamindar* having four shares out of 100 shares in the village. In the earlier settlement, Data Ram had refused to accept the assessment offered by the Settlement Officer and accordingly settlement was made with the assignees of the Government revenue who were called Muafidars. Data Ram and other persons similarly circumstanced were allowed a Malikana allowance and were permitted to continue to hold possession of their *sir* land. In the settlement of 1874-75, Data Ram and others asked that settlement be made with them. The Settlement Officer, by an order, dated October 1, 1875, refused to grant the application on the ground that Data Ram and others were not entitled

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to the settlement but only to be paid a Malikana allowance. The learned Single Judge found that Data Ram and others could not be excluded from settlement under the 1873 Act since they had not refused to accept the settlement. It was apparently on account of this illegal exclusion of Data Ram and others from the settlement that it was held that Data Ram and others lost their proprietary rights and, therefore, the Malikana allowance was in respect of the lost proprietary rights. That was not a case which was governed by s. 53 of the 1873 Act. The exclusion of the Raja or Taluqdar from the settlement under s. 53 of the 1873 Act could not and did not result in the extinction of the proprietary rights, as this section specifically kept alive the rights of such proprietors and provided for a due provision being made for securing their rights. *Bhagwan Das's* case (1), therefore, does not support the appellant's contention.

Learned counsel then relied on two decisions of the Board of Revenue: The first is *Munshi Govind Prasad v. Suraj Baksh* (2). This case arose in Avadh and was covered by the Oudh Revenue Law. It was observed in this case—

“An under-proprietor is just as much the owner of his land as a proprietor without the affix. He can deal with it like any other proprietor and his interest is heritable and transferable. The point of distinction, in Oudh Revenue Law, is that the word ‘proprietor’ signifies the proprietor “(or part proprietor) of a *mahal* entitled to engage directly with Government for the land revenue. An under-proprietor is the owner of land within a *mahal* who does not engage directly with Government but pays his assessment to the proprietor of the *mahal*.”

(1) 6 A.L.J. 524

(2) Selected decision no. 4 of 1903.

I do not see how these observations at all help the appellant. Possibly, in Avadh, a settlement could not be made with an under-proprietor. But the position here under the Regulation and the 1873 Act is quite different. The second case is *Baiju Sing v. Narayan Din* (1). This case was also under the Oudh Rent Act. The question, which arose for consideration in this case, was whether a 'plot proprietor' was an under-proprietor within the meaning of the Oudh Rent Act. It was held that such a person, who paid revenue to the *lambardar*, was not an under-proprietor. It was observed—

"The test is not whether Government revenue is paid direct, but whether the right to engage for its payment exists."

It was held that a plot proprietor had a right to engage for the payment of revenue with the Government. This case also turned upon the provisions of the Oudh Rent Act and can be of no help to the appellant. Therefore, from the mere fact that the settlement for payment of land revenue has not been made with the Taluqdar of Raja of Daiya, it does not follow that the proprietary rights of the Taluqdar or Raja were extinguished.

I accordingly answer the question referred as follows :

On the facts and circumstances of this case, the Malikana allowance granted to the appellant was not by way of compensation for acquisition of his proprietary title in the 135 villages.

Let the case be now laid before the Bench concerned with my opinion.

Question answered.

(1) Selected decision no 8 of 1914.

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Before Mr. Justice S. Chandra and Mr. Justice
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U. P. Z. A. and L. R. Act, 1950, s. 232—*Possession voluntarily given up before the date of vesting—Application for restoration of possession still competent.*

Where the applicant lost possession by voluntarily giving it up before the date of vesting his application for restoration of possession is maintainable.

—, 1950, s. 21(1)(c) and *U. P. Tenancy Amendment Act, 1947, s. 27(3)*—*Proviso to s. 27(3)—Person declared sub-tenant under the proviso becomes Asami under s. 21(1)(c) of the U. P. Zamindari Abolition and Land Reforms Act*

The Scheme underlying these provisions is that if courts have declared a person to be a sub-tenant under the proviso, he will become an Asami and no one else would become an Adhivasi in respect of that land, even though he may have been recorded in the revenue papers of 1356 F. But if there was no such sub-tenant and there is only a re-instated tenant under s. 27(3), then a person who had been recorded as an occupant of such land will become an Adhivasi under cl (b) (1). The erstwhile re-instated tenant shall lose his right

Land referred to section in the proviso to sub-s (3) of s. 27. —*Not equivalent to land mentioned in s. 27(3)*

'Land referred to in the proviso to s. 27(3)' does not mean the land referred to in s. 27(3) itself.

Special Appeal No. 746 of 1965 from the judgment and decree, dated November 2, 1965 in Writ Petition no. 435 of 1961 decided by S. N. SINGH, J

G. Verma, for the Appellant.

S. C., for the Respondent

S. CHANDRA, J.:—This appeal arises out of proceedings for restoration of possession under s. 20/232 of the U. P. Zamindari Abolition and Land Reforms Act. The

appellant claimed that he was recorded in 1356 F., and became an *adhivasi* under cl. (i) of sub-s. (b) of s 20. He was, in virtue of a compromise arrived at in some criminal proceedings, made to relinquish possession of the land. Since he had become an *adhivasi*, he was entitled to be restored to possession. This application was contested by respondents nos. 4 to 8, who were the tenants-in-chief. They alleged that respondents nos. 1 and 2, the Zamindars, had, in a suit under s. 171, U. P. Tenancy Act, ejected them. They in due course applied for restoration of possession under s. 27(3) of the U. P. Tenancy Amendment Act (no. 10), 1947. That application was allowed, and on March 27, 1951, they were restored to possession over the plots in dispute. Thereafter some criminal litigation ensued between the parties, which ended in a compromise, whereunder the appellant relinquished possession of the land in favour of the respondents tenants by an application, dated March 15, 1952. Since the appellant voluntarily relinquished possession, he was not entitled to restoration of the possession. The appellant's case that he had become an *adhivasi* was also contested.

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The trial court rejected the appellant's claim. It was held that the appellant had not been ejected from the plots, and, hence, the application for restoration of possession was incompetent. On appeal, however, it was held that the appellant was recorded as an occupant in 1356 F; he became an *adhivasi*, and, since he was not in actual possession, when he made the application, it was maintainable. The appeal was allowed, and the application was granted.

The respondents preferred a revision before the Board of Revenue. The Board held that the appellant became an *asami* under s. 21(1)(c) of the Act. His claim that he had become an *adhivasi* was incorrect. On this find-

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ing, the application made by the appellant was dismissed.

A learned Single Judge dismissed the writ petition. He held that the appellant did not become an *adhwasi*. Alternatively, he held that the writ petition was incompetent, because of non-impleadment of heirs of Bhajan Lal, one of the tenants who had instituted the revision before the Board of Revenue, but died during the pendency of the revision.

It appears that while the writ petition was pending, the appellant made an application for correction of the memorandum of the writ petition by scoring out the name of Bhajan Lal and introducing in its place the name of Har Bilas. The learned Single Judge, however, did not pass any orders on this application. He doubted whether Har Bilas was the only heir of Bhajan Lal. Since this fact was not clearly stated in the application for amendment, he refused to act on the basis as if Har Bilas was the sole heir. He held that the writ petition was improperly constituted for lack of heirs of Bhajan Lal. This was an additional ground for dismissing the writ petition.

In the memorandum of appeal, Har Bilas has been impleaded as respondent no. 8. For the appellant, an application has been moved, stating that the Board of Revenue had impleaded only Har Bilas as the heir of the deceased Bhajan Lal. Under the circumstances, the application for amendment made by the appellant on October 20, 1965, deserved to be allowed. In any event, if the learned Single Judge was doubtful, he should have asked the parties to clarify the position rather than leaving the matter vague. We are satisfied that there was a *bona fide* mistake in the typing of the memorandum of the writ petition. We consequently allow the amendment application, dated October 20, 1965. With

this amendment, the technical defect in the writ petition stands removed.

On merits, the plea taken by the respondents that, since the appellant had voluntarily relinquished possession as a result of a compromise. He was not entitled to maintain the petition for restoration of possession under s 20/232 of the Zamindari Abolition Act, has no substance. A Full Bench in *Hari Nath v R P Singh* (1) has held that the Explanation to s 232 does not preclude the institution of an application even in those cases where the applicant lost possession by voluntarily giving it up before the date of vesting. In the present case, the relinquishment of possession took place on March 15, 1952, namely, prior to the date of vesting. In view of the above Full Bench decision, the application made by the appellant was maintainable.

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It is not disputed that in proceedings under s. 27(3) of the Act (no 10) of 1947, the respondents were reinstated as tenants. No one was declared to be a sub-tenant of the land within meaning of the proviso to s. 27(3). It is also undeniable that the appellant was recorded in possession in the revenue papers of 1356 F. The question is whether he comes within the purview of cl. (i) of s. 20(1)(b) of cl. (c) of s. 21(1) of the Zamindari Abolition Act. Both the clauses relate to 'Land referred to in sub-s (3) of s 27 of the U. P Tenancy (Amendment) Act, 1947'. A person, who, on the date immediately preceding the date of vesting, occupied or held, land as a sub-tenant, referred to in the proviso to sub-s. (3) of s 27, becomes an *asami* under s. 21(1)(c). It is no one's case that the appellant occupied or held land as a sub-tenant within meaning of the aforesaid proviso. The provision applies to a person, who is declared a sub-tenant for a period of three years. Admittedly, no such

(1) 1968 R D 108 (F B).

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declaration had ever been made in the case of the appellant. The appellant could not become an *asami*.

S 20(1)(b)(i) reads—

“Every person who :

(b) was recorded as occupant—

(i) of any land other than grove land or land to which s. 16 applies or land referred to in the proviso to sub-s. (3) of s. 27 of the U. P. Tenancy (Amendment) Act, 1947, in the Khasra or Khatauni of 1356 F. prepared under ss. 28 and 33, respectively of the U. P. Land Revenue Act, 1901, or . . . shall, unless he has become a *bhumidhar* of the land under sub-s. (2) of s. 18 or an *asami* under cl. (h) of s. 21, be called *adhivasi* of the land”

Cl. (b)(i) applies to the record as an occupant, in respect of land other than the three categories of land mentioned in it. The first category is a grove land. A person who is recorded as an occupant of a grove land does not become an *adhivasi*. The second similar exception is in respect of land to which s. 16 applies; and the third exception is in respect of land referred to in the proviso to s. 27(3), namely, in respect of which a declaration of sub-tenancy in favour of some persons has been made. The result is that if a person has been declared a sub-tenant of any land under the proviso to s. 27(3), then, in respect of that land, any person who is recorded as an occupant does not become an *adhivasi*, because in respect of such land the sub-tenant becomes an *asami* under s. 21(1)(c). The scheme underlying these provisions is that if courts have declared a person to be a sub-tenant under the proviso, he will become an *asami* and no one else would become an *adhivasi* in respect of that

land, even though he may have been recorded in the revenue papers of 1356 F. But, if there was no such sub-tenant and there is only a re-instated tenant under s. 27(3), then a person who had been recorded as an occupant of such land will become an *adhivasi* under cl (b)(i). The erstwhile re-instated tenant shall lose his right.

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In this light, it is not quite correct to say that the land referred to in the proviso to sub-s. (3) of s. 27 is equivalent to land mentioned in s. 27(3). It is true that the plot of land is the same. But different persons are in occupation of it. The incidence and impact of the provisions of the Zamindari and Land Reforms Act are different according to the fact whether a sub-tenant is in possession or the tenant-in-chief. Keeping in view the different consequences, the fact of recording being of the tenant-in-chief, or the sub-tenant, is material and relevant. We are hence unable to agree with the learned Single Judge that the phrase 'land referred to in the proviso to s. 27(3)' means the land referred to in s. 27(3) itself.

In the present case, the land in dispute was not one which could have reference to the proviso (because there was no sub-tenant on it). The land not falling within one of the exceptions, cl. (b)(i) would apply. Since the appellant was recorded as occupant thereof in 1356 F., became an *adhivasi*.

In the result, the appeal succeeds and is allowed. The judgment of the learned Single Judge is set aside. The judgment of the Board of Revenue is quashed, and that of the Additional Commissioner restored. As no one has appeared on behalf of the respondents, there will be no order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice S Chandra and Mr. Justice
K. N Seth

DILAWAR SINGH

... APPELLANT,

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GRAM SAMAJ AND OTHERS

... RESPONDENT.

1972
May, 29.

U. P. Consolidation of Holdings Act, 1953, ss. 48 and 52—
Notification under s. 52 issued—Revision under s. 48 filed afterwards—Revision is maintainable and should be decided on merits.

Right of a litigant to take the proceeding to a superior court, if an adverse order is passed against him, comes into existence the moment a proceeding is initiated and is continued till the *lis* continues. The right is to be governed by the law prevailing at the date of institution of the suit or appeal and not by the law that prevails at the date of the decision or at the date of filing of appeal.

On the filing of a claim or objection before Consolidation Officer, certain rights vested in a party to take the proceeding to the superior authorities could not be taken away by a subsequent enactment unless it was expressly or by necessary implication so provided. There is nothing in s. 52 of the Act which either expressly or by necessary implication takes away that right.

Special Appeal no 578 of 1964 against the judgment and order of S. N. DWIVEDI, J. dated July 16, 1964.

U. N. Khare, for the Appellant

S. C., for the Opposite-parties.

K. N. SETH, J.:—In consolidation proceeding Smt. Tulsa was allotted a chak in lieu of certain plots of which she was the recorded tenure-holder. While the consolidation operations were still in progress, she died in 1962. On her death, the appellant made an application under s. 12 of the Consolidation of Holdings Act (hereinafter referred to as the Act) for mutation of his name in place of her name claiming to her heir, being the daughter's son. Another application was filed by

one Nathu Singh. The Gaon Samaj also entered the arena claiming that Smt. Tulsa had died without leaving any heir and her property had vested in the Gaon Samaj. The Consolidation Officer, by his order dated May 13, 1963, upheld the claim of the present appellant and rejected the claim put forward by the Gaon Samaj and Nathu Singh. The Gaon Samaj preferred an appeal which was allowed by the Settlement Officer (Consolidation) by an order, dated November 28, 1963, holding that the property of Smt. Tulsa had vested in the Gaon Samaj. Against the order of the Settlement Officer (Consolidation), the appellant filed a revision on December 12, 1963. Before the revision was filed, a notification under s. 52 of the Act was issued on December 7, 1963. The revision was dismissed on the ground that after the notification under s. 52 of the Act, the revision could not be entertained. The order of the Deputy Director (Consolidation) was challenged in this Court by a petition under Art. 226 of the Constitution. A learned single Judge dismissed the petitioner and hence this appeal.

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It is admitted that when the notification under s. 52 of the Act was issued, no revision had been filed challenging the order of the Settlement Officer (Consolidation). The question for consideration is whether the revision filed on December 12, 1963, was maintainable.

Sub-s. (2) of s. 52 of the Act was added by s. 43 of the U. P. Amendment Act no. VIII of 1963 and reads—

“Notwithstanding anything contained in sub-s. (1), any order passed by a court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases or proceedings pending under this Act on the date of issue of the notification under sub-s. (1), shall be given effect to by such authorities as may be prescribed

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and the consolidation operations shall, for that purpose, be deemed to have not been closed."

Under the aforesaid provision the consolidation authorities were bound to give effect to orders passed by court of competent jurisdiction in cases or proceedings pending under the Act on the date of the issue of the notification under sub-s. (1). It was contended that proceeding initiated by the applications made by the rival claimants had not finally concluded by the order passed by the Settlement Officer (Consolidation) and were still pending when the notification under sub-s. (1) of s. 52 of the Act was issued. The learned single Judge took the view that in order to attract the provisions of sub-s. (2), a proceeding must be actually pending on the date of the notification and it should not be in mere contemplation. In the present case the revisional proceeding was only in contemplation till it was filed on December 12, 1963, and it could not be accepted that on December 7, 1963 when the notification was issued, the revisional proceeding was pending.

A proceeding whether initiated through a suit or an application embraces within its ambit all the rights available to a party by way of appeals, second appeals or revisions. In *Gavikapati v. Subbiah Choudhry* (1) S. R. DAS, C. J., delivering the majority judgment laid down that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic entity and are to be regarded as one legal proceeding and that the right of appeal was not a mere matter of procedure but was a substantive right. The Court further observed that the institution of the suit carried with it the implication that all rights of appeal then in force were preserved to the parties thereto till the suit was finally decided and that right of appeal was a vested right which ac-

(1) A I.R. 1957 S.C. 510.

crued to the litigant from the date the list commenced and this vested right could be taken away by a subsequent enactment if it so provided expressly or by necessary intendment. It is thus clear that the right of a litigant to take the proceeding to a superior court, if an adverse order is passed against him, comes into existence the moment a proceeding is initiated and it continues till the *lis* continues. The right is to be governed by the law prevailing at the date of the institution of the suit or appeal and not by the law that prevails at the date of the decision or at the date of the filing of the appeal. Applying this principle it has to be held that on the filing of a claim or objection before the Consolidation Officer, certain rights vested in a party to take the proceeding to the superior authorities. That right could not be taken away by a subsequent enactment unless it was expressly or by necessary implication so provided. There is nothing in s. 52 of the Act which either expressly or by necessary implication takes away that right.

In Gopi Singh v. Deputy Director of Consolidation (1) the objection filed by some of the parties were allowed by the Consolidation Officer by an order, dated August 25, 1965. An appeal was preferred before the Settlement Officer (Consolidation). While the objections were still pending before the Consolidation Officer, a notification under s. 52 of the Act was published on May 22, 1965. An objection was raised in appeal that it was not competent as the appeal had not even been instituted when the notification under s. 52 was published. This objection prevailed and the same was upheld by the Deputy Director (Consolidation) in revision. The matter came up to this Court in a petition under Art 226 of the Constitution and one of us (SATISH CHANDRA, J.) relying on the principle laid down in *Garikapathi's* case (2) held—

(1) 1967 A.I.J. 139

(2) A.I.R. 1957 S.C. 840.

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"The term 'proceedings' in s. 52(2) has, in my opinion, been used in that comprehensive sense to include the entire series of proceedings commencing from the one which is initiated before the Consolidation Officer and including that taken in the appeal court. When an appeal is instituted the proceeding which commenced in the trial court continues. The appeal does not initiate a fresh proceeding. On the institution of the appeal the proceedings which have become dormant on the decision by the trial court, revive and remain pending. The only difference being that it is now pending in a different court, namely, the court of appeal."

It was further observed—

"The word 'cases' in the phrase 'cases of writs filed under the Constitution', in sub-s. (2) will include orders passed by higher courts of appeal including the Supreme Court. Thus, sub-s. (2) is designed to preserve and make effective orders passed by any one or more of the hierarchy of courts established under the Act, irrespective of whether the proceeding was pending in any particular court or in any court subordinate thereto, on the date of issue of the notification in sub-s. (1)."

We are in agreement with the view taken in the aforesaid case.

The principle of a vested right of a litigant to take a proceeding to the superior court by an appeal would be equally applicable in case of a revision. It is true that a revision is a power conferred on a court or authority to be exercised at its discretion but it does not mean that the litigant does not possess the right to approach the superior court through a petition for revision. The only basic difference between an appeal and

a revision is that in case of an appeal the appellant is entitled to a relief if he succeeds in establishing that the order of the subordinate court or authority was unsound contrary to law. In case of a revision the court has discretion to refuse the relief if, for example, in its opinion substantial justice had been done between the parties although the order sought to be revised suffered from infirmities which could justify an interference by the revising court.

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There is no definition of the word "appeal" in any statute. In Warton's Law Lexicon "appeal" is defined as "the judicial examination of the decision by a higher court of the decision of an inferior court." In *Nagendra Nath Dev v Suresh Chandra Dey* (1) their Lordships observed that any application by a party to an appellate court asking it to set aside or revise a decision of the subordinate court is an appeal within the ordinary acceptation of the term. This indicates that there is no basic difference between the appellate and the revisional powers. If under a statute a party has a right to approach the superior court with a prayer to revise the order of the subordinate court, the proceeding can be said to be pending till the right to exercise the right of approaching the superior court subsists in the applicant and so long that right subsists, it cannot be said that the proceedings had finally come to an end. The right to approach the superior court through an appeal or a revision can be exercised only after an adverse judgment or order is passed against the party. Till then the right only remains dormant and when that right is exercised, the original proceedings become pending.

In the instant case the order of the Settlement Officer (Consolidation) was passed on November 28, 1963. Against that order the petitioner had a right to approach the Deputy Director (Consolidation) under s.

(1) 1982 P.C. 165.

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48 of the Act. Before his right to approach the superior court came to an end, the notification under s 52 was issued. That notification did not have the effect of destroying the right which the petitioner had. The proceedings initiated by the appellant under s. 12 of the Act had not come to an end. It was still pending when the notification under s 52 of the Act was issued although in a dormant shape and had become active again when the revision was filed. In this view of the matter the Deputy Director (Consolidation) was in error in holding that the application under s. 48 of the Act could not be entertained. The learned single Judge also fell in the same error and his order cannot be sustained.

Before the learned single Judge a question was raised that the claim of the Gaon Samaj was barred by time. The learned Judge noticed that the argument had not been advanced before the Settlement Officer (Consolidation) and no ground had been raised in the writ petition and as the point was not taken earlier, he would not permit it to be raised at the time of argument. The learned Judge, however, decided the question on merit. In our opinion it was not necessary for the learned single Judge to decide this question on merits after he had come to the conclusion that the revision before the Deputy Director (Consolidation) was incompetent and the petitioner was not entitled to any relief.

In the result we allow the appeal, set aside the order of the learned single Judge, dated July 16, 1964 and quash the order of the Deputy Director (Consolidation), dated June 4, 1964. The Deputy Director (Consolidation) is directed to decide the revision filed by the present appellant on merits. The parties shall bear their own costs.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice S. Chandra and Mr. Justice
N. D. Ojha*

CITY BOARD OF MUSSOORIE ... APPELLANT,
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July, 12.

U. P. Municipalities Act, 1916, s. 128(i)(vii), rr. 3 and 4, item 10(b)—Unloaded vehicles passing through Municipality—Not liable for toll—Only transit pass fee to be realised.

R 4 read in the context of other rules and the schedule applies to an empty vehicle or conveyance merely passing through the municipality, enroute to an outside destination. Such a vehicle is liable to pay a transit fee, and as such under r. 3 is not liable to pay toll.

———, s. 128(i)(vii) item 10(b) —*The driver of the vehicle is not liable to pay toll.*

Since the vehicles which are only in transit are liable to pay transit fee, the driver of such vehicle could not be held liable to pay toll when the transit fee has been paid.

Special Appeal no. 402 of 1964 from the judgment and order of S. N. DWIVEDI, J., dated March 18, 1964.

S. N. Misra, for the Appellant.

S. N. Kacker, S. C., for the Respondent.

S. CHANDRA, J.:—Of this group of nine Special Appeals 8 have been filed by the City Board Mussoorie. The ninth one is a cross-appeal filed by Shri Amolak Ram Oberai. Shri Oberai along with one Khem Chand had filed a group of writ petitions challenging the demand and levy of toll tax on account of the fact that Khem Chand while driving the vehicle owned by Mr. Oberai took it on a strip of land which the City Board claimed vested in it.

It appears that Mr. Oberai is a resident within the municipal limits of Dehra Dun. He owns a godown at Rajpur within the Dehra Dun Municipality. There

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are some limestone quarries in village Karwa in the district of Dehra Dun. The quarries are situate outside the limits of the City Board, Mussoorie, Mr. Oberai had employed Khem Chand as his driver. Khem Chand used to drive the private carrier owned by Mr. Oberai from his residence or godown to the quarry and return from there. The private carrier passes through a strip of land which the City Board claims vests in it. According to the City Board Mussoorie the appellant was liable to pay toll on the vehicle when it enters the disputed strip of land. The Board also levied toll on the driver of the vehicle in addition to the toll levied on the vehicle. The appellant, however, refused to pay toll whereupon the City Board launched a large number of criminal prosecutions in the Court of the Sub-Divisional Magistrate, Mussoorie and the Naib Tehsildar, Mussoorie in relation to each trip that the appellant's vehicle made while going to and returning from the quarry.

The learned single Judge held that under the rules framed by the City Board, Mussoorie, no toll was leviable on the driver but that toll was payable on the vehicle, even though it was empty, when it passed through the disputed strip of land. He also held that the Transit Pass Rules were not applicable to empty motor vehicles. The learned Judge did not go into the factual controversy whether the disputed strip of land vested in the City Board and proceeded on the assumption that it did.

Two questions which arise for consideration in these appeals are whether the Transit Pass Rules are applicable to empty vehicles and secondly whether toll is leviable on the driver of a vehicle in addition to the toll that may be levied on the vehicle.

On September 7, 1955 the State Government issued a notification promulgating a new set of rules which

were called the Transit Pass Rules for the municipalities levying toll. These Rules came into force from October 15, 1955. The preamble to the Rules stated that in exercise of the powers conferred by s. 296 read with s. 153 of the Municipalities Act the Governor is pleased to make the following rules for the transit of goods and vehicles etc through the limits of Municipalities for outside destinations. The second rule provides that they will come into force with effect from October 15, 1955, in all the municipalities levying or which may thereafter levy a toll on vehicle and other conveyances, animals and laden coolies under s. 128(1) (vii) or an octroi on goods or animals under s. 128(1) (viii) of the U P Municipalities Act. By the third rule it was provided that if there was any conflict between these rules and other existing rules in the various municipalities these rules will prevail. The result of this rule is that if in a given situation the Transit Pass Rules are applicable then no toll could be levied under any other existing rules—

R 4 provides:

“4. Every vehicle or other conveyance or animals laden solely with goods meant for immediate export or laden coolies or animals, merely passing in transit through the municipality to an outside destination, shall be permitted to pass through it, under cover of a transit pass in the prescribed forms, subject to the payment of a security equal to the amount of toll or octroi, as the case may be leviable thereon and the transit fee as detailed in the ‘Schedule’ and in accordance with the procedure prescribed hereafter :

Provided that in cases where the octroi or toll leviable on any goods or loaded vehicle is less than the transit fee the Board shall charge only a transit fee equal to such octroi or toll and no security shall be taken :

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Provided further that no security or transit pass fee shall be leviable on goods loaded on vehicles etc. the property of which vests in Government, if they are accompanied by a certificate from an Officer (who should ordinarily be a Gazetted Officer) of the Government Department concerned, that the goods are the property of Government that the vehicle carrying the goods is not on hire and are/is for transit through the municipality."

The remaining rules provide the procedure for carrying into effect the provisions of r. 4

The Schedule by entry no. 2 provides—

"2. Loaded vehicle drawn by one animal, loaded push cars, loaded hand thelas, bicycle loads, animal loads, loaded rickshaws, and any other vehicle or conveyance not falling under any other heads mentioned in the Schedule."

At the end of the Schedule there is a declaration form. The form provides—

"I. as person incharge of the goods conveyance which I am taking into this municipality hereby declare that the goods/conveyance are meant for immediate export/is in transit through it and are/is being taken by me to I further declare that the goods or any part thereof that I am carrying shall not be unloaded within the limits of the municipality."

These rules also provide the form of the transit pass. It has several entries. Serial number 4, is meant for description of goods, vehicle or conveyance Serial number 3 provides for the rate of octroi or toll leviable on the goods, vehicle or conveyance.

It will be seen that the obvious object of these Transit Pass Rules is to substitute for the levy of octroi or toll upon goods or vehicles or other conveyances, the transit fee. If a particular vehicle or conveyance is in transit through a particular municipality it is liable to pay only the transit fee and in that event will not be liable to pay the toll that may be leviable by the municipality on the vehicle or on the goods carried on it. The second rule provides that these rules shall come into force in all the municipalities levying or which may thereafter levy a toll on vehicles and other conveyances, animals and laden coolies under s. 128 (1) (vii). Under this provision admittedly toll can be levied on vehicles simpliciter, even though they may not be loaded. The City Board, Mussoorie is charging toll under item 10(b) on empty vehicles. In fact the learned single Judge has held that toll is payable under that clause on empty carriers. Rule 2 clearly postulates that these will apply in relation to vehicles which could be subject to toll under s. 128(1) (vii). This indicates that the rules were intended to apply to vehicles simpliciter also and that it was not necessary that the vehicles must be laden with goods, before these rules become applicable to them.

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This intention is further clarified by the declaration form that the person incharge of the vehicle has to give in order to obtain a transit pass. In the declaration it has to be said that he was the person incharge of the goods conveyance. The phrase is not goods on the conveyance.

The Schedule lays down the rate of the transit fee for different kinds of things. Entry no. 2 which has been quoted above mentions various kinds of loaded vehicles or conveyances and then says "any other vehicle or conveyance not falling under any other heads men-

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tioned in the Schedule". The other entries in the Schedule refer to vehicles as well as loaded tractor up to 2 tons or upto 4 tons. Thus all kinds of loaded vehicles and conveyances have been specifically dealt with in the various entries to the Schedule. In that context the residuary provision in the second part of entry no. 2, namely, "any other vehicle or conveyance not falling under any other heads" mentioned in the Schedule obviously will include all other kinds of vehicles or conveyances including the vehicles or conveyances which are not loaded with goods or other things. In our opinion this residuary clause includes in its scope empty vehicles or conveyance.

Rule 4, in our opinion, should be interpreted and construed in a manner which may not frustrate the purpose and object of the rules, or the specific provisions of the various other rules and the Schedule which attracts the applicability of the rules to empty vehicles. Rule 4 purports to provide that if a vehicle or any other conveyance is laden with goods which are meant exclusively for immediate export shall have to pay not only the transit fee but also a security equal to the amount of toll or octroi levied on the goods laden on the particular vehicle. The object of r. 4 was merely to provide for the security for the toll leviable on the goods that were laden on the vehicle. The person incharge of the vehicle was, in any case, liable to pay transit fee but in addition he was liable to pay security in relation to the goods carried on the vehicle. The main object was to safeguard the interest of the municipalities in relation to payment of toll on the goods. The two provisos clarify this. By the first proviso it was provided that if the amount of toll or octroi was than the transit fee the Board shall charge only transit fee equal to such octroi or toll and no security need be taken. The provisos deal only with the question of security in

relation to the toll. They do not throw any light upon the main rule on the question whether that rule applies to empty vehicles also. No doubt r. 4 is inartificially framed. But its meaning is clear.

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In our opinion r. 4, read in the context of other rules and the Schedule applies to an empty vehicle or conveyance merely passing through the municipality, en-route to an outside destination. Such a vehicle is liable to pay a transit fee, and as such, under r. 3 is not liable to pay toll.

The second question involves the decision of the question whether a driver is liable to pay toll. The learned single Judge held that he is not liable because he was not "the person conveyed" on the vehicle within the meaning of item 10 (b) of the Rules. Since the vehicles which are only in transit, as is the case before us, are liable to pay transit fee and consequently are not liable to pay toll, obviously the driver of such vehicle could not be held liable to pay toll when transit fee has been paid. In this situation whether the driver of such a vehicle is liable to pay under Item 10 (b) toll is a question merely of academic interest. The learned single Judge held that driver was not "a person carried" within the meaning of that item. We have doubt as to the correctness of that view, but we need not express any final opinion on the point.

Before the learned single Judge, the counsel appearing for the City Board gave an undertaking that the Board shall withdraw the criminal cases pending against Khem Chand, the driver. Mr. *Kacker*, stated before us that in spite of this undertaking the City Board did not withdraw the criminal complaints pending against Khem Chand. In view of our finding that the drivers of the appellant's vehicles were not liable to pay toll while they were carrying the vehicles through

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the land of the City Board Mussoorie enroute to or from the quarry, the prosecutions launched by the Board were entirely without jurisdiction and are liable to be quashed.

In the result, the appeal filed by Mr. Oberai is partly allowed with costs. The direction of the learned single Judge that the City Board should charge toll on empty vehicles is set aside. The Board is restrained from doing so. The various prosecutions mentioned above launched against Khem Chand are quashed. The other appeals which have been filed by the City Board, Mussoorie are dismissed, but without any order as to costs.

Ordered accordingly.

APPELLATE CIVIL

*Before Mr. Justice S. Chandra and Mr. Justice
N. D. Ojha*

JOGENDRA BAHADUR ... APPELLANT,

v.

1972 SENIOR SUPERINTENDENT, Post

July 17 OFFICE, ALLAHABAD AND OTHERS ... RESPONDENTS.

Constitution of India, Arts. 310 and 311(2)—*An extra departmental agent working as Branch Post Master—Civil Service—Necessity of second show cause notice—Entitled to protection under Art. 311(2).*

An Extra Departmental Branch Post Master is a public servant entrusted with the duty to do official acts in relation to the affairs of the Union, and is the holder of civil post within the meaning of Arts. 310 and 311(2) of the Constitution. He is entitled to the protection of Art. 311(2), and is entitled to the reasonable opportunity of making representation on the penalty proposed to be awarded. Order of dismissal held void.

Special Appeal no. 319 of 1965 from the judgment and decree of Asthana, J., in Writ Petition no. 3086 of 1960 decided on March 30, 1965.

Kameshwar Prasad Agrawala, for the Appellant.

S. C., for the Respondents.

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S. CHANDRA, J.:—The appellant was in September 1954 employed as an extra departmental agent and posted as Branch Post Master Nahwai at Allahabad on a monthly salary of Rs.25 per month. On July 13, 1959 the Senior Superintendent of Post Offices, Allahabad Division served upon the appellant a charge-sheet requiring the appellant to furnish his explanation and also requiring him to show cause why in case the charges were established he should not be removed from service by way of punishment and a sum of Rs.2,005 be directed to be recovered from him. The appellant submitted his explanation on July 30, 1959. On August 8, 1959 the Superintendent fixed a time, date and place for holding the oral hearing. The appellant, however, did not appear. The Superintendent proceeded to decide the matter on the existing materials. He found the charges established and on October 17, 1959 passed an order removing the appellant from service and also directing that the amount of Rs.2,005 be recovered from the appellant. The appellant filed an appeal to the Director of Postal Services but it was rejected on January 6, 1961.

Aggrieved the appellant instituted a writ petition in this Court which was dismissed. Hence the present appeal.

Mr. K. P. Agrawal, appearing for the appellant, has submitted before us only one point. He urged that the appellant was holding a civil post under the Union within the meaning of Art. 310 of the Constitution.

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He was hence entitled to the protection of Art. 311 (2) whereunder no order of removal from service could validly be passed without affording the appellant an opportunity to show cause against the proposed punishment. Learned counsel submitted that it was incumbent upon the authorities to have given a notice to the appellant to show cause against the proposed punishment, after completion of the enquiry into the charges and after the enquiry officer found the charges established. The appellant could not adequately represent against the proposed punishment until he knew the contents of the findings in regard to the charges. The decision of the Supreme Court in *Khem Chand v. Union of India* (1) supports the submission. There it was held that after the completion of the enquiry, it was incumbent upon the authorities to give a notice to show cause against the proposed punishment. In this state of the law the combined notice served on the appellant on July 13, 1959 was invalid in so far it required the appellant to show cause against the proposed punishment because till then the charges had not been found proved.

Mr. T. N. Sapru, appearing for the respondent, countered the submission by urging that the appellant was not employed on a civil post. He was not the holder of a civil post within meaning of Art. 310 of the Constitution, and so Art. 311(2) was not attracted.

This very point, namely, whether an extra departmental agent was the holder of civil post within the meaning of Art. 311 of the Constitution came up for consideration before this Court in *Mangla Datt Chaube v. Senior Superintendent of Post Offices* (2). In that case one of us held—

“The true connotation of the term ‘civil post’ as used in these Articles was explained by the

(1) A.I.R. 1958 S.C. 300.

(2) Writ Pet. no. 473 of 1968 decided on Jan. 21, 1969.

Supreme Court in *State of Assam v. K. C. Datta* (1)
 It was observed that a civil post is a post on the civil as distinguished from the defence side of the administration; and employment in a civil capacity under the Union or a State. Since civil services of the Union or All India Services or a civil service of a State is mentioned separately in Arts. 310 and 311 of the Constitution, a civil post would mean a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under the State is a person serving or holding the post under a State. The heading and the sub-heading of Part XIV and Chap. I emphasise the element of service. There is a relationship of master and servant between the State and the person said to be holding a post under it. It then held—

‘The existence of this relationship is indicated by the State’s right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a point’.

The court then went on to hold that a post is an office or a position to which duties in connection with the affairs of the State are attached; an office or a position to which a person is appointed, and, which may exist apart from and independently of the holder of the post. A post may be created before the appointment or simultaneously with it. A post under the State means

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a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post. It was also observed by the Supreme Court that the fact that the post does not carry a definite rate of pay but carries a remuneration by way of a commission, or the fact that the post may not entail a whole-time employment, would not detract from the employment being to a civil post.

Judged in the light of these principles, an Extra Departmental Agent would, in my opinion be the holder of a civil post. These Agents are governed by the rules called the Posts and Telegraphs Extra Departmental Agents (Conduct and Service) Rules, 1964, framed by the Government. Under it an employee has been defined to mean a person employed as an Extra Departmental Agent. Such an agent means 17 kinds of posts including an Extra Departmental Branch Post Master. The petitioner was appointed to this post. Under r. 3 the appointing authority in respect of each category of employees is as shown in the Schedule annexed to the Rules. Under r. 5 the employee shall be entitled to such leave as may be "determined by the Government from time to time." R. 6 deals with termination of service of such an employee. Under r. 7 penalties including removal from "service" and dismissal from "service" can be imposed on an employee for good and sufficient reasons. R. 8 prescribes the procedure for imposing penalties. The employee is entitled to appeal against an order imposing penalty to the authority to which the authority imposing the penalty is immediately subordinate. R. 17 prescribes that every employee shall at all times maintain absolute integrity and devotion to duty. Under r. 18 an employee is forbidden to be a member of, or associated with any political party or from taking part in any political movement

or activity. R. 19 prohibits an employee from resorting to any sort of strike in relation to his conditions of "service". Under r. 24 no employee shall except with the previous sanction of the Government have recourse to any court or to the press for the vindication of any official act which has been the subject-matter of adverse criticism or an attack of defamatory character.

From the affidavits filed in this case it appears that the duties of an Extra Departmental Branch Post Master are identical to any other Branch Post Master who is employed as a member of the regular service of the Posts and Telegraphs Department of the Government of India. It is thus clear that the post of an Extra Departmental Branch Post Master is under the administrative control of the Union, and is a post to which the duties in connection with the affairs of the Union are attached. The specified officers of the Government have the right to select and appoint the holder of the post. The Government has the right to remove or dismiss him from service. It is apparent that the Branch Post Master has to do his duties under the control and supervision of the higher departmental authorities. He draws a definite rate of monthly pay.

He is a public servant entrusted with the duty to do official acts in relation to the affairs of the Union. It is in my opinion evident that a relationship of master and servant exists between the Government of India and an Extra Departmental Agent. Such an employee is hence the holder of a civil post within meaning of Arts. 310 and 311 of the Constitution. He is entitled to the protection of Art 311 (2). Under it such an employee is entitled to a reasonable opportunity of making representation on the penalty proposed to be

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awarded. No such opportunity was admittedly afforded to the petitioner. The order of dismissal violated Art. 311(2) of the Constitution and was consequently, void and of no legal effect.

For the respondents reliance was placed upon *Ch. Venkata Swamy v. Superintendent, Post Offices* (1). There it was held on a consideration of the relevant conditions of employment then prevailing, that an Extra Departmental Agent was not a person holding a civil post. That case was disapproved by the Supreme Court in *State of Assam* case (2), referred to above. Further, it appears that at that time one of the rules provided that if an Extra Departmental Branch Post Master goes on leave he could himself nominate his successor for the duration of his leave. No such rule exists now. That case therefore, is distinguishable.

It was also submitted that under r. 284 of Vol. 284 of the Posts and Telegraphs Manual a Branch Post Office should be placed in charge of an Extra Departmental Postal Agent such as School Masters, Station Masters, Shop-keepers, land owners and pensioned servants of Government who have sources of income. School Masters, Station Masters and others who are paid servants are not to be appointed as Extra Departmental Postal Agents without the previous consent of their superior officers or the employers as the case may be. The police

(1) A I.R. 1957 Orissa, 112.

(2) A. I. R. 1967 S. C. 884.

officer who is not a pensioner is not to be employed as Extra Departmental Postal Agent without the previous sanction of the Director General of Postal Services. On the basis of the rule it was suggested that an Extra Departmental Postal Agent is not a civil post but an employment otherwise than on a civil post. The qualifications or the situation in life of the persons who can be selected by the Government to a particular post would not be relevant or material to the question whether the employment is on a civil post within the meaning of Art 310 of the Constitution. The concept of a civil post under Art 310 of the Constitution has been explained by the Supreme Court in the case referred to above. The fact that the post is created or abolished by the Government at its choice, that it has a right to make an appointment to it, the fact that the post carries duties relating to the administration of the Government, coupled with the fact that there exists a relationship of master and servant between the Government and the holder of the post, clearly establish that Extra Departmental Postal Agent is a civil post.

In this case reference has been made to the 1964 Edition of the Rules. We have seen the 1959 Edition of the Manual. There also no rule permits the agent to nominate his successor during a leave vacancy. We are in agreement with the view taken in this case. The appellant was holding a civil post. There being a clear breach of Art. 311(2) the order of dismissal cannot be sustained.

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In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside. The impugned order dated October 17, 1959 in so far as it imposed upon the appellant the punishment of removal from service is quashed. It will, however, be open to the respondent to take appropriate proceedings and pass suitable orders. Under the circumstances, the parties shall bear their own costs.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice Jagmohan Lal*

SUNDER LAL

. . . APPLICANT,

v.

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Oct., 26.

RAM SWAROOP

.. DEFENDANT.

Code of Civil Procedure, 1908, O. IX, rr. 6, 13, and O III, r 4(2)—*Ex-parte decree—Defendant's counsel present but reports no instructions—Decree passed under O. IX, r. 6, if an ex-parte decree—Setting aside of.*

Held, it is true that, even if the defendant is not personally present but is present through a pleader duly instructed and able to answer all material questions relating to the suit as contemplated by O. V., r 1 (2)(b) the appearance of the lawyer may amount to the appearance of the defendant for the purposes of O IX, r 6. But in this case the defendant was not represented by a pleader duly instructed on the date, because his counsel who was engaged by him under O. III, r. 4, C P C had clearly stated that he had no instructions from the defendant. Under these circumstances the decree that was passed by the trial court on 29th September, 1966 was an *ex-parte* decree which could be set aside on the application of the defendant made under O IX, r. 13, C. P. C. if sufficient cause was shown to the satisfaction of the court for his non-appearance on that date.

Civil Revision No. 336 of 1968 against the judgment and order dated 8th November, 1968 passed by S. N. SHUKLA, Additional District Judge, Lucknow in Miscellaneous Civil Appeal No 120 of 1968.

Umapati Rai, for the Applicant.

R. P. Srivastava, for the Opposite-party.

J M. LAL, J.:—This revision arises out of a suit which was fixed for hearing in the court of Munsif on 29th September, 1966. On that date the plaintiff was present but the defendant was absent and his counsel reported that he had no instructions from his client.

*While sitting at Lucknow.

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The learned Munsif therefore proceeded *ex parte* and decreed the suit. The defendant then applied under O. IX, r. 13, C. P. C. for setting aside this *ex parte* decree. The application was supported by an affidavit in which it was alleged that the defendant had fallen ill and for that reason he could not come to court on the date of hearing. No counter-affidavit was filed on behalf of the plaintiff. The learned Munsif, however, rejected this application under O. IX, r. 13 on the ground that since the defendant had engaged a lawyer and his engagement shall be deemed to continue till the conclusion of the suit as provided in O. III, r. 4(2) of the C. P. C. the mere physical presence of the lawyer on that date would amount to the presence of the defendant and as such the decree cannot be said to have been passed *ex parte* under O. IX, r. 6, C. P. C. The defendant filed an appeal against that order. The lower appellate court took a different view in the matter and held that on the facts of the case O. III, r. 4 had no application. That court further recorded a finding of fact that the defendant had been prevented by sufficient cause from appearing in court on the date fixed for hearing of the suit. The lower appellate court accordingly allowed the appeal and set aside the *ex parte* decree. It is against that order that this revision has been filed.

I heard the learned counsel for the applicant. He contends that since the defendant's counsel was present in court his presence would be deemed to be the presence of the defendant and as such this decree cannot be said to have been passed *ex parte*. This contention cannot be accepted for the obvious reason that O. IX, r. 6 speaks about the appearance of the defendant and provides that if the defendant does not appear when the suit is called for hearing, the court

can decide the suit *ex parte*. It was under this provision that the suit was decreed *ex parte* by the trial court in the absence of the defendant. It is true that even if the defendant is not personally present but is present through a pleader duly instructed and able to answer all material questions relating to the suit as contemplated by O. V, r. 1 (2) (b), the appearance of the lawyer may amount to the appearance of the defendant for the purposes of O. IX, r. 6. But in this case the defendant was not represented by a pleader duly instructed on that date, because his counsel who was engaged by him under O. III, r. 4, C. P. C. had clearly stated that he had no instructions from the defendant. Under these circumstances the decree that was passed by the trial court on 29th September, 1966 was an *ex parte* decree which could be set aside on the application of the defendant made under O. IX, r. 13, C.P.C. if sufficient cause was shown to the satisfaction of the court for his non-appearance on that date. On this point, the lower court has recorded a finding of fact that there was sufficient cause for the non-appearance of the defendant. Under these circumstances, the order passed by the lower appellate court does not suffer from any illegality or impropriety so as to require an interference by this Court in this revision. The revision is dismissed. There will be no order for costs as the other side has not put in appearance. The stay order dated 21st November, 1969 is discharged.

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Revision dismissed.

CIVIL MISCELLANEOUS

Before Mr. Justice G. C. Mathur and Mr. Justice
A. K. Kirtu

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. . . PETITIONER,

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.. OPPOSITE-PARTIES.

U. P. Zamindari Abolition and Land Reforms Act, 1950, ss. 20 (a) (i), (b) (i), 21(1) (h) and 16—Tenant of *sir*—Person so recorded in the records of 1356 F—No acquisition of *adhvasi* rights under s 20 (b)(i)

A person, who is, in fact, a tenant of *sir* and claims *adhvasi* rights under s. 20(b)(i), can acquire such rights under this provision and even if he can be considered to be a recorded occupant by virtue of the fact that he is entered as a tenant of *sir* in the records of 1356 F. he cannot acquire *adhvasi* rights under s 20(b)(i). The acquisition of *adhvasi* rights by him under s. 20 (a) (i) can only be defeated if it is shown that he is a tenant of *sir* land referred to in sub-cl. (a), cl. (i) of Explanation under s 16 and his landholder was, on the relevant dates, a disabled person in which case he will acquire only *asami* rights under s. 21(1)(h). The question whether he can be considered to be a recorded occupant or not, does not affect the acquisition of *adhvasi* or *asami* rights by him.

Civil Miscellaneous Writ No. 3170 of 1965 connected with Civil Miscellaneous Writ No. 3171 of 1965.

V. K. S. Chaudhary, for the Petitioner

S C., for the Respondents.

G. C. MATHUR, J.:—These two writ petitions are before us for decision on a reference made by S. N. SINGH, J. The question, which has necessitated these references, is—

“Whether a tenant of *sir*, who is so recorded in the records of 1356 Fasli, is a ‘recorded occupant’

for purposes of s. 21(1) (h) of the U. P. Zamindari Abolition and Land Reforms Act."

SATISH CHANDRA, J. has, in Second Appeal No. 3950 of 1959 decided on 29th October, 1968, taken the view that the tenant of *sir* is not a 'recorded occupant' and S. N. SINGH, J., in the order of reference, has taken a contrary view.

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In consolidation proceedings, objections were filed by Raja Ram (respondent no. 6 in Writ Petition No. 3170 of 1965) and by Bharat Singh (respondent no. 6 in Writ Petition No. 3171 of 1965) claiming that on the date of vesting they had become *adhivasis* of the land in dispute and, subsequently, *sirdars* of the land and that the petitioner, who is the successor-in-interest of the original *sir*-holder, became *bhumidhar* on the date of vesting but her rights were extinguished under Chap. IX-A of the Act. The petitioner contended that they became *asamis* and not *adhivasis*. The Consolidation Officer and the Settlement Officer (Consolidation) decided in favour of the petitioner but the Deputy Director of Consolidation in second appeal and the Joint Director of Consolidation in revision have held in favour of the contesting respondents.

There is no dispute about the facts of these cases. The admitted facts are set out in the order of the Consolidation Officer. They are:

(1) That Janki Ballabh was the original zamindar and the *sir*-holder of the disputed plots. He died in April 1946, and was succeeded by his widow Srimati Kiran Kunwar and by his pre-deceased son's widow Srimati Prakash Kunwar. Srimati Prakash Kunwar died in 1951 and Srimati Kiran Kunwar died in 1953 and the petitioner,

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(ii). The reason given for the view was that person, who was, in fact, a sub-tenant, held the land on behalf of the tenant and, therefore, he could not be treated as a mere occupant. S N. SINGH, J. has observed that the decision in *Pir Khan's* case (1) has been overruled by a Full Bench of this Court in *Chobey Sunder Lal v. Sonu* (2). The main question for consideration before the Full Bench was whether, in view of the Supreme Court decisions referred to above, the decision of the earlier Full Bench in *Ram Dular Singh v. Babu Sukhu Ram* (3) was still good law or not. The Full Bench held that the decision in *Ram Dular Singh's* case (3) was no longer good law. The Full Bench was not called upon to decide whether a person, who was, in fact, a sub-tenant and was so recorded in 1356 Fasil, could be treated as a 'recorded occupant'. So far as we can see, the 1967 Full Bench deals with a different question and has not overruled the decision of the Division Bench in *Pir Khan's* case (1). An occupant can only be against the zamindar or the tenant or sub-tenant of the land, i.e., against some one holding the legal title in the land. If the land has been let out to tenant, then the occupant can only be against the tenant. If the name of the tenant is recorded in the records of 1356 Fasli and he can be considered to be a recorded occupant also, then he will be an occupant against himself. S. 20(b) does not contemplate a rightful tenure-holder being an occupant—it contemplates an occupant as some one other than the rightful tenure-holder who is capable of acquiring *adhivasi* rights against him. However, in the view which we are taking, it is neither necessary to examine this question any further nor to refer the matter for decision to a larger Bench.

(1) 1965 A.L.J. 591.

(2) 1967 A.L.J. 960 (F.B.).

(3) 1963 A.L.J. 667 (F.B.).

The relevant part of s. 20 reads as follows:

"20 Every person who—

(a) On the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act—

(i) except as provided in sub-cl. (1) of cl. (b), a tenant of *sir* other than a tenant referred to in cl. (ix) of s. 19 or in whose favour hereditary rights accrue in accordance with the provisions of s. 10, or

(ii) except as provided in sub-cl. (1) of cl. (b), a sub-tenant other than a sub-tenant referred to in proviso to sub-s. (3) of s. 27 of the United Provinces Tenancy (Amendment) Act, 1947, or in sub-s. (4) of s. 47 of the United Provinces Tenancy Act, 1939 of any land other than grove land;

(b) was recorded as occupant—

(i)

(ii)

shall, unless he has become a *bhumidhar* of the land under sub-s. (2) of s. 18 or an *asami* under cl. (h) of s. 21, be called *adhivasi* of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof"

In the present cases, the contesting respondents were admittedly tenants of *sir* land. Admittedly, they were not tenants referred to in cl. (ix) of s. 19 or tenants in whose favour hereditary rights accrued under s. 10; nor are they tenants who have become *bhumidhars* under sub-s. (2) of s. 18. Therefore, they became *adhivasis* under s. 20(a) (i) unless they can be held to have be-

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come *asami* under s. 21(1) (h) of the Act. S. 21(1) (h) reads thus:

“21(1). Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as—

(h) a tenant of *sir* land referred to in sub-cl. (a) of cl. (1) of the Explanation under s. 16, a sub-tenant referred to in sub-cl. (ii) of cl. (a) of s. 20 or an occupant referred to in sub-cl. (1) of cl. (b) of the said section where the landholder, or, if there are more than one landholder, all of them were person or persons holding—

(a) if the land was let out or occupied prior to the ninth day of April, 1946, both on the date of letting or occupation, as the case may be, and the ninth day of April, 1946, and

(b) if the land was let out or occupied on or after the ninth day of April, 1946, on the date of letting or occupation, to any one or more of the clauses mentioned in sub-s. (1) of s. 157;

.

shall be deemed to be an *asami* thereof”

Cl. (h) seeks to confer *asami* rights on three classes of persons, namely, (i) tenants of *sir*, (ii) sub-tenants, and (iii) occupants. It will be noticed that it is on these three classes of persons that s. 20 seeks to confer *adhivasi* rights. In view of the words in s. 20 “unless he was become an *asami* under cl. (h) of s. 21” and of the opening words of s. 21 “notwithstanding anything

contained in this Act", it is clear that the provisions of s. 21 (1) (h) will override the provisions of s. 20 and a person, who acquires *asami* rights under s. 21 (1) (h) will not acquire *adhivasi* rights under s. 20. It is, therefore, legitimate to read s. 20 together with s. 21 (1) (h). Thus read together, it is apparent that a tenant of *sir*, who has not already become a *bhumidhar*, *sirdar* or hereditary tenant, will acquire *adhivasi* rights under s. 20 (a) (i) unless he is covered by the first part of clause (h) of s. 21(1) and is a tenant of *sir* land referred to in sub-cl. (a) of cl. (i) of the Explanation under s. 16 and his landholder is a disabled person. Likewise, a sub-tenant would acquire *adhivasi* rights under s. 20 (a) (ii) unless he falls in the second class of cases contemplated in cl. (h) of s. 21 (1) and his landlord is a disabled person. Similarly, a recorded occupant, who is covered by the provisions of s. 20 (b) (i) would acquire *adhivasi* rights under that section unless he was covered by the third class of cases mentioned in cl. (h) of s. 21(1) and his landlord was a disabled person. Where a person is a tenant of *sir* and claims *adhivasi* rights under s. 20 (a) (i), it is only permissible to see whether, under cl. (h) of s. 21(1), he is a tenant of *sir* land referred to in sub-cl. (a) of cl. (i) of the Explanation under s. 16 and has as such acquired *asami* rights but it is not permissible to consider whether he should be treated as a recorded occupant and whether, as a record occupant, he has acquired *asami* rights under s. 21(1) (h). In order to defeat the acquisition of *adhivasi* rights under the various provisions of s. 20, it is only legitimate to consider whether, under the corresponding provision of s. 21 (1) (h), he has acquired *asami* rights. Therefore, all that was necessary to consider in the present cases was whether the contesting respondents, who were admittedly the tenants of *sir* and who admittedly had not acquired *bhu-*

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midhani, *sardari* or hereditary tenancy rights, acquired *asami* rights under s. 21 (1) (h) by virtue of the fact that they were tenants of *sir* land referred to in sub-cl. (a) of cl. (i) of the Explanation under s. 16. The Deputy Director of Consolidation as well as the Joint Director of Consolidation have rightly held that, since the landholders paid a land revenue of more than Rs. 250 per annum, the *sir* land was not covered by sub-cl. (a) of cl. (1) of the Explanation under s. 16. In fact, this part of the decision of the Deputy Director of Consolidation and of the Joint Director of Consolidation has not been challenged before us. The only question raised was whether the contesting respondents could, for purposes of s. 21 (1) (h), be treated as recorded occupants and, as such recorded occupants, be deemed to have acquired *asami* rights.

Before the Joint Director of Consolidation an argument was raised that the words 'except as provided in sub-cl. (i) of cl. (b)' occurring in s. 20 (a) (i) indicate that a tenant of *sir*, who is recorded as a tenant of *sir* in 1356 Fasli, acquires *adhivasi* rights not under s. 20 (a) (i) but under s. 20 (b) (i) as a recorded occupant. This contention was rightly repelled by the Joint Director. What these words indicate is that, if A is the tenant of *sir* on the date immediately preceding the date of vesting and B is recorded as occupant of *sir* in 1356 Fasli, then B will acquire *adhivasi* rights in preference to A. These words do not mean that a person, who is, in fact, a tenant of *sir* and who is so recorded in the records of 1356 Fasli, will not acquire *adhivasi* rights under s. 20 (a) (i) but will do so under s. 20 (b) (i). A tenant of *sir* can acquire *adhivasi* rights only under s. 20 (a) (i) and he can acquire *asami* rights only if he falls under the first part of s. 21 (1) (h).

In our opinion, a person, who is, in fact, a tenant of *sir* and claims *adhivasi* rights under s. 20 (a) (i), can acquire such rights only under this provision and even if he can be considered to be recorded occupant by virtue of the fact that he is entered as a tenant of *sir* in the records of 1356 Fasli, he cannot acquire *adhivasi* rights under s. 20 (b) (i). The acquisition of *adhivasi* rights by him under s. 20 (a) (i) can only be defeated if it is shown that he is a tenant of *sir* land referred to in sub-cl. (a) of cl. (i) of the Explanation under s. 16 and his landholder was, on the relevant dates, a disabled person in which case he will acquire only *asami* rights under s. 21 (1) (h). The question whether he can be considered to be a recorded occupant or not does not affect the acquisition of *adhivasi* or *asami* rights by him.

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The Deputy Director of Consolidation and the Joint Director of Consolidation have rightly held that the contesting respondents in these two writ petitions acquired *adhivasi* rights on the coming into force of the Act, and, subsequently, became *sirdars*. Both the writ petitions are accordingly dismissed. Since no one has appeared to contest the writ petitions, there will be no order as to costs.

Writ Petitions dismissed.

CIVIL REFERENCE (S. B.)

Before Mr. Justice S. N. Dwivedi, Mr. Justice A. K.
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DARBARI SINGH SAINI ... APPLICANT,

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Indian Stamp Act, 1899, ss 31 and 32—Collector certified a particular document as an agreement—Covered under Art. 5(c)—Collector can take a different view on the similar documents for which no certificate was issued earlier—Principle of *res judicata* not applicable

A certificate issued by the Collector in each case is in respect only of the particular instrument certified and is not meant to be operative in respect of instruments of a similar nature not brought before him for certification. The opinion of the Collector in an earlier case thus cannot debar him from giving a different opinion subsequently on the principle of *stare decisis*. It can also not debar him from arriving at a different conclusion to which he has arrived in the present case on the principle of *res judicata* as there was neither a judicial determination of the matter by the Collector nor the present applicant was a party to the earlier instrument.

—, Art. 35, Sch. I-B and Art. 5(c) Agreement to grant a lease in future—Premium and rent paid to get lease—Document is an agreement to let and duty is payable under Art. 35, Sch. I-B and not under Art. 5(c), Sch. I-B.

Where if the Improvement Trust had undertaken to grant in future a lease in favour of the first party or his nominee by executing necessary lease deeds and the first party had for the purpose of obtaining that lease paid certain amounts by way of premium and rent to the Improvement Trust in respect of the plots mentioned in Sch. B of the document held that the document will be an agreement to let.

Even though an agreement to lease may not possess all the characteristic of lease and may not effect demise of property, it would be chargeable to stamp duty of the same amount as lease under Art. 35 read with the entry about an agreement to lease mentioned in Art. 5 of the Schedule.

Miscellaneous Stamp Act Reference No. 841 of 1971 made by Darbari Singh Saini under s. 57 of the Indian Stamp Act.

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H. SWARUP, J :—The Chief Controlling Revenue Authority, U P, i.e. the Board of Revenue, has made the reference under s. 57 of the Stamp Act for our opinion on the following questions :

(1) Whether the document under reference is a lease or an agreement to let immovable property and duty is payable on it under Art. 35, Sch. I-B of the Stamp Act, as amended in its application to U. P., vide U. P. Stamp (Amendment) Act, 1962?

(ii) If the answer to the above question is in the affirmative, then whether the document would fall under cl. (c) of the aforesaid Art. 35 and the total amount of Rs. 3,78,095.73 (representing Rs. 69,591.21 already paid on account of a premium Rs. 49,136.10 already paid as development charge and Rs. 1,59,368.42 promised to be paid as development charges) would be treated as premium and Rs. 732.50 as annual rent for calculating the proper stamp duty due thereon and whether additional stamp duty at the rate of Rs. 2 as imposed by s. 67-H of the U. P. Town Improvement Act, 1919 (U. P. Act VIII of 1919) as amended by s. 5(1) of the U. P. Local Self-Government Laws (Amendment) Act, 1966 (U. P. Act XXIX of 1966), on deeds of transfer of immovable property situated within the limits of Ghaziabad Regulated Area, vide U. P. Government notification no. 1102 H/XXXII—50 (24)-H-59, dated 20th July, 1960, published in *Uttar Pradesh Gazette*, Part I, page

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1107, dated 23rd July, 1960, will also be payable on the document on the total amount on which stamp duty is payable?

(iii) If the document under reference is held to be chargeable with duty under Art. 35 (c) of Sch. I-B, then whether the subsequent lease deeds, giving possession in respect of portion of land detailed in Sch. B to the document, to be executed by the Improvement Trust in favour of the nominee of party no. II will be chargeable with duty under Art. 25(c) Sch. I-B on the amount of premium stated therein and rent reserved thereunder and whether additional duty at the rate of Rs. 2 as imposed by s. 67-H of the U. P. Town Improvement Act, 1919 (U. P. Act VIII of 1919) as amended by s. 5 (1) of the U. P. Local Self-Government Laws (Amendment) Act, 1966 (U. P. Act XXIX of 1966) on deeds of transfer of immovable property situated within the limits of Ghaziabad vide U. P. Government notification no. 1102-H/XXXVII—50(24)-H-50, dated 20th July, 1960 will also be payable thereon or whether such documents will be chargeable with duty of Rs. 2.25 only under proviso to Art. 35 of Sch. I-B?

(iv) Whether the Inspector of Stamps and Registration, Meerut acting as Collector under s. 40 of the Stamp Act or the Board of Revenue, as the Chief Controlling Revenue Authority, acting under s. 56(i) thereof, are barred on the principle of *res judicata* and *stare decisis* from examining the question of proper stamp duty payable on the document for the reason that the Collector, Meerut, had, acting under section 31/32 of the Act, endorsed certain other documents on which a

duty of Rs.2.25 had been paid as properly stamped?

(v) If the answer to question no. (i) is in the negative then whether the obligation to pay a sum of Rs. 1,59,368 42 contained in cl. (3) of the document, having been attested is a bond under section 2(5) (b) of the Stamp Act and is chargeable with duty under Art. 15, Sch. I-B of the Act?

(vi) Whether the document is a simple agreement covered by Art. 5(c) of Sch. I-B of the Stamp Act and is, as such, properly stamped?

Certain lands described in Sch. A of the document in dispute were acquired under the provisions of the Land Acquisition Act for purposes of the Improvement Trust of Ghaziabad from Darbari Singh Saini, applicant, and certain other persons. The Improvement Trust entered into an agreement with the applicant and other owners separately in respect of the lands acquired and the agreement with the applicant is the subject-matter of the reference. The document was described as an agreement and was stamped with Rs.2.25. By this agreement the Improvement Trust agreed to execute in favour of the applicant or his nominees deeds of lease in respect of the land described in Sch. B of the document in consideration of certain payments of premium, development cost and money equivalent to lease rent by the applicant or his nominees. The applicant paid to the Improvement Trust a sum of Rs.69,591.21 which was described as premium and also a sum of Rs.49,156 10 which was described as initial deposit being 20 per cent of the development charges and promised to pay further a sum of Rs 1,59,368.42 in eight half-yearly instalments representing ten per cent of the development charges and also promised to pay a further sum of Rs.732.05 per

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annum which was described as equivalent of lease land. All these amounts were paid or were payable to the Improvement Trust. In consideration of these payments the Improvement Trust undertook to execute a deed or deeds of lease in respect of one or more of the plots in Sch. B for a period of ninety years, in favour of the applicant or his nominees. Quite a number of similar agreements were executed between different parties. The Improvement Trust on 29th August, 1970 sent a *pro forma* of the draft agreement similar to the one under reference to the Collector, Meerut with the request that proper stamp duty thereon be assessed. The A. D. M. (E), Meerut gave the opinion that the agreement was chargeable with stamp duty under Art. 5(c) of the Stamp Act and also as an agreement to lease with the stamp duty under Art. 35 of Sch. I-B of the Act. He requested the Improvement Trust to supply the particulars for the opinion about the quantum of duty payable. The Improvement Trust then obtained the opinion of its counsel and forwarded it to the Collector. After considering the opinion, the Improvement Trust was informed that the documents may be treated as a pure agreement and the stamp duty chargeable thereon was only Rs.2.25. Similar documents are said to have been executed after this opinion, on stamp of Rs.2.25. The document under reference is similar in nature to the document the draft of which was sent to the Collector, but when the document was presented before the Sub-Registrar, Ghaziabad, for registration, the Inspector of Stamps and Registration happened to examine it and he being of opinion that the document constituted a lease held it to be liable to be stamped under Art. 35(c) of Sch. I-B of the U. P. Stamp Amendment Act, 1962 with stamp duty of Rs.18,288.75. Accordingly the document was

impounded and action was taken under s. 40 of the Stamp Act by the Inspector who is also the Collector under the Stamp Act. Besides requiring the deficiency in duty to be paid he also imposed a penalty of Rs.100.

Aggrieved by this order, the applicant filed a revision under s. 56(1) of the Act to the Chief Controlling Revenue Authority (the Board of Revenue). The Board of Revenue was of opinion that the document was an agreement to lease and was liable to stamp duty under Art. 35(c) of Sch. I-B of the Stamp Act. A further contention raised before the Board was to the effect that the opinion expressed by the Collector in similar cases, to the effect that the document was a simple agreement covered by Art. 5(c) and liable to be stamped with Rs.2.25 only, was a decision which on the principles of *res judicata* and *stare decicis* affected the present document also and the Collector was bound by that decision. The Board was of opinion that this contention was not correct, but since it was of the view that important questions of interpretation of the provisions of the Stamp Act were involved and were of general importance, it has referred to us the aforesaid questions of law.

Learned counsel for the applicant has contended that the decision given by the Collector under s. 31/32 of the Act was of binding effect and on the principles of *res judicata* and *stare decicis* the Collector could not now demand higher stamp duty on the document in question. We see no force in this contention. The certificate issued under s. 32 when an instrument is brought to the Collector under s. 31 is in respect of that particular document only and cannot operate on any other documents. S. 31(1) of the Act states:

“When any instrument, whether executed or not and whether previously stamped or not, is

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brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than fifty paise) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, is chargeable."

Under s. 32(1) of the Act the Collector has to certify by endorsement on that very instrument. Sub-s. (3) of s. 32 of the Act says:

"Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped"

It is thus apparent that a certificate issued by the Collector in each case is in respect only of the particular instrument certified and is not meant to be operative in respect of instruments of a similar nature not brought before him for certification. The opinion of the Collector in an earlier case thus cannot debar him from giving a different opinion subsequently on the principle of *stare decisis*. It can also not debar him from arriving at a different conclusion to which he has arrived in the present case on the principle of *res judicata* as there was neither a judicial determination of the matter by the Collector nor the present applicant was a party to the earlier instrument. We accordingly answer question no. 4 referred to us in the negative.

The only other question pressed by learned counsel for the applicant is question no. 1. Question no. 2

has not been pressed. Question no. 3 does not arise at this stage. It would arise only if and when the applicant nominates other persons for taking the lease and the lease is actually executed by the Improvement Trust in their favour. We accordingly return questions nos. 2 and 3 unanswered.

Questions 1 and 6 are inter-related and question no. 5 will not arise if our answer to question no. 1 is in the affirmative. The clauses of the instrument relevant for the purposes of the reference are as follows:

"And whereas further the second party has expressed its option to obtain lease either in his favour or in favour of his nominee (s) in 40 per cent of his acquired land as developed plotted area;

And whereas in pursuance of the said option the Trust is prepared to give to the second party the developed plotted area as stated above and more particularly described in Sch. B on the terms hereunder mentioned;

Now, therefore, this agreement incorporating the respective obligations of both the parties witnesseth as follows"

(5) In consideration of the payment by the second party of the amount of the premium, development cost and money equivalent to lease rent as stated in cl. 4 above and also of its obligations to perform the terms and conditions of this agreement, the Trust undertakes to execute in favour of any person competent to contract and nominated by the second party a deed of lease in the form enclosed for maximum period of 90 years

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reckoned to have commenced from the date of initial deposit of development cost by the second party as contemplated above, of one or more of the plots in Sch. B in no case in area exceeding the proportion which the development costs actually paid bear to the whole amount thereof as provided in this agreement, it being clearly understood that to the extent such proportion covers only a fraction of a plot the same shall be ignored.

(6) The second party would be bound to obtain lease deed (s) in favour or its nominee(s) in any case within five years from the date of allotment order and in case he fails to do so, the Trust may require it to have the same executed in his own name failing which the Trust will have a right to execute lease deeds in favour of any person of its own choice and the money obtained as premium under that lease by the Trust shall be payable to the second party after deducting the the expenses, if any, incurred in executing the lease deed and the audit fee paid by the Trust over the money received as premium.

(7) In case of failure of the second party to perform any of the terms and conditions or covenants provided for in this agreement or the failure to pay any money as provided herein, the Trust shall be entitled to determine this agreement whereafter the second party shall forfeit his right to obtain leases in respect of plots for which lease deeds have not been executed up to the date of determination either in his favour or in favour of his nominee(s) without prejudice to the rights, however of second party to settle account of moneys payable by or to the Trust up to the date of determination.

Provided that failure to pay any two instalments alone of the development cost shall not entail the con-

sequence of determination of the agreement". The terms extracted above from the instrument make it clear that through the present agreement the Improvement Trust had undertaken to grant in future a lease in favour of the first party or his nominees by executing necessary lease deeds and the first party had for the purpose of obtaining that lease paid certain amounts by way of premium and rent to the Improvement Trust. The lease was to be in respect of the plots mentioned in Sch. B to the document. By this document the parties had agreed to obtain a lease in respect of an immovable property. Plainly the document will be an agreement to let.

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Learned counsel for the applicant contended that as there was no present demise of the land, the instrument could not be an agreement to let. Continuing the contention he urged that as the lease was to come into existence only after the land had been developed it was an agreement of a contingent nature and could not amount to an agreement to lease for purposes of the Stamp Act. The point of contingency in our opinion is hardly relevant for determining the nature of the present instrument, the rights dealt with by which are subject to no contingencies, what may be dependent on the contingencies, which are only of the nature of defaults, will be the execution in future of actual deeds. If the present agreement binds the parties to give on lease the land, it would not cease to be an agreement to lease merely because of some default of a party, lease may not actually be given.

For deciding whether a demise either *in presenti* or in future is an essential requisite of an agreement to lease or let, a true construction of the provisions of the Act relating to payment of stamp duty on agreements to lease would be essential and for that purpose it would be appropriate to see the historical development and

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the entries in the earlier enactments. The Indian Stamp Act of 1879 defined lease in s. 3(12) as follows:

“ ‘Lease’ means a lease of immovable property and includes also—

(a) a *patta*;

(b) a *kabuliyat* or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay, or deliver rent for, immovable property;

(c) any instrument by which tolls of any description are let; and

(d) any writing on application for a lease intended to signify that the application is granted.”

A document of lease was chargeable under Art. 31 of Sch. I of that Act. Art. 4 of Sch. I provided for an “agreement to lease” and in the second column about stamp duty it was said; “the same duty as a lease”. The provisions came up for consideration before a Full Bench of the Madras High Court in “A reference under the Stamp Act”. (L.L.R. 17 Mad. 280). The Court had to consider an agreement by which there was effected no demise and was followed up by a separate deed of lease through which the property was actually demised. The learned Judge observed:

“We are of opinion that the document is an agreement for lease and that it must be stamped as such under Art. 4, notwithstanding that another instrument was intended to be executed.”

The Act of 1879 was replaced by the Stamp Act of 1899 and was further amended by the Indian Stamp Amendment Act, 1910. Art. 5 in the Schedule contained an entry: “agreement to lease”, but there was a note: “See lease (35)” and Art. 35 ran as follows:

"Lease including an underlease, a sub-lease and an agreement to let or sub-let."

Arts. 5 and 35 continued in the same form except that by the U. P. Stamp Amendment Act of 1962 the maximum fixed by the proviso was enhanced. Art. 35, as amended in U. P., now runs as follows:

"Provided that in any case when an agreement to lease is stamped with the *ad valorem* stamp required for lease, and a lease in pursuance of such agreement is subsequently executed the duty on such lease shall not exceed two rupees and twenty-five paise."

Hence although there has been a little change in the phraseology, there has been no substantive change in the scheme of the Act so far as the chargeability of an "agreement to lease" to stamp duty was concerned. An "agreement to lease" has still been subjected to the same stamp duty as a lease without its being included in the definition of lease. The adoption of a similar scheme of provisions relating to agreements to lease in the new enactment suggests legislative approval of the decision of the Madras High Court in "A reference under the Stamp Act (*supra*) which was decided on 1st March, 1894. The provisions in the Indian Stamp Act now in force must, therefore, receive similar interpretation. Thus even though an agreement to lease may not possess all the characteristics of a lease and may not effect demise of property, it would be chargeable to stamp duty of the same amount as a lease under Art. 35 read with the entry about an agreement to lease mentioned in Art. 5 of the Schedule.

It may be helpful to mark the distinction between the meaning assigned to "agreement to lease" in the Stamp Act and the Registration Act. In the Indian Registra-

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tion Act lease has been defined not as it is defined in the Stamp Act, but as:

"Lease includes a counterpart, a *qabuliat*, and an undertaking to cultivate or occupy and an agreement to lease."

Under s. 17(1) (d) of the Registration Act, a document creating a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent is compulsorily registerable. S. 49 of the same Act provides:

"No document required by s. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

. . . . unless it has been registered."

Under the Registration Act, therefore, an 'agreement to lease must have the same character as a lease and hence if it has not the effect of transferring property, it may not be possible to regard it as an "agreement to lease". A demise whether in the *presenti* or in future may thus be essential for an agreement to be classed as an "agreement to lease" for being registered as a lease under the Registration Act, but for the purpose of stamp duty it is not necessary that the 'agreement to lease' should by its own force transfer property or effect demise either in *presenti* or in future

The proviso added by the U. P. Amendment Act of 1962 to Art. 35(c) in Sch. I-B of the Stamp Act also

makes it clear that the agreement to lease may be something different from the lease itself. If the agreement to lease by itself were necessarily to transfer property or effect a demise, there will be no need for a further instrument of lease and the proviso will in all cases be inoperative. An "agreement to lease" can, therefore, be an agreement which even though binds the parties to execute in future a lease, may not effect the demise by its own force.

Learned counsel for the applicant relied on the case of "*In re Indian Stamp Act*" (1). It was observed in that case :

"Now, it is clear that, in law, an agreement to lease may effect a present demise or it may not. If it effects a present demise, then an agreement to lease would fall under Art. 35, if it does not effect a present demise, then an agreement would fall under Art. 5 which deals with agreements or memoranda of agreement and would fall under Art. 5(c) which deals with all those cases which are not dealt with under Art. 5(a) or Art 5(b)."

No reasons have been given by the learned Judges, who decided the case, for holding that the agreement to lease will be covered by Art. 5(c) even though Art. 5 itself refers to Art. 35 for imposition of duty on an agreement to lease. We are respectfully unable to accept the view expressed in that case as, in our opinion, an agreement to lease under Art. 35 does not exclude agreements to lease which do not effect a demise either *in presenti* or in future but contemplate and bind parties to make a lease in future. Moreover, the point did not arise for decision in that case because lease pursuant to the agreement to lease had been executed and the only question was about the payment of stamp duty on the second document, namely, the lease deed. The observation is mere-

(1) A.I.R., 1952 Bom. 199.

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ly of the nature of *obiter dictum*. Similarly, with great respect, we are unable to agree with the view expressed by the learned Judges in the case of *Maneklal Manilal* (1), to the effect that an agreement to lease must amount to an actual demise. The case proceeded on certain presumptions which, in our opinion, were not called for. It was assumed that the provisions of the Registration Act and the Stamp Act could be read together for interpreting the Stamp Act, and it that "Both under the Indian Stamp Act and the Indian Registration Act an agreement to lease' is included in the word 'lease'." As already seen, an 'agreement to lease' is included in the term 'lease' in the Registration Act, but it is not so included in the Indian Stamp Act. There is a separate entry in Art. 5 in Sch. I-B of the Stamp Act dealing with an 'agreement to lease' and reference to Art. 35 is only for the purpose of the stamp duty payable. An agreement to lease is treated as a different category of instruments than instruments of lease. Hence demise cannot be regarded as an essential element of an agreement to lease when the matter is to be considered with respect to the provisions of the Indian Stamp Act.

In the case of *Gore v. Lloyd* (2), dealing with the matter about payment of stamp duty, Lord ABINGER, C. B., observed:

"The first question is, whether that document is a lease, and requires a stamp accordingly. There may be many things about which the parties may enter in such a case into a written agreement, without its being a demise, taking it for granted that a demise already exists, or will exist."

ALDERSON, J. in that very case observed:

"The first question on which we have to decide is, whether this memorandum, stamped as it was, was properly received in evidence as an agreement.

The next is, whether, upon the proper construction of the agreement and the parol evidence together, the rent was a forehand rent payable in September. And the third is, whether the Act of executing the warrant of attorney was an act of bankruptcy.

“Now, with respect to the first question, the rule which is laid down in all the cases is, that you must look at the whole of the instrument, to judge of the intention of the parties as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease. And, looking at the whole of this instrument, it appears to me that it was not intended to give an immediate right to the party to be from that moment, and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is, an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes”

We consider that these observations lay down the correct state of law and when applied to the present case the instrument will be an ‘agreement to let’ within the meaning of Art 35 of Sch. I-B of the Indian Stamp Act and as such will be liable to be stamped with the duty prescribed in the second column of Art. 35 in Sch. I-B of the Stamp Act. As an agreement to lease it would be covered by the latter clause of Art. 5 referring to Art. 35 and not to the earlier part of Art. 5(c) dealing with agreements other than agreements to lease.

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Our answers to the questions referred by the Board of Revenue accordingly are:

Question no. 1—Affirmative.

„ no. 2—Returned unanswered.

„ no. 3—Returned unanswered.

„ no. 4—Negative.

„ no. 5—Returned unanswered.

„ no. 6—Negative.

Questions answered.

CIVIL REFERENCE (S. B.)

Before Mr. Justice S. N. Dwivedi, Mr. Justice Hari Swarup and Mr. Justice C. S. P. Singh

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STATE OF U. P.

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Indian Stamp Act, 1899, s. 2(15) and Sch. I-B, Art. 45—Document reciting the factum of earlier partition—Subsequent document executed to serve evidence of earlier partition—Chargeable to duty not as an instrument of partition

Where a document executed on 4th September, 1969 recited that the parties who belonged to the same family had partitioned the properties and entered into separate possession of their shares on 27th March, 1969 and subsequently a map had also been prepared while certain portions of it had been left joint and the document was being executed to serve as evidence of the earlier partition, *held*; that it was not an instrument of partition and the stamp duty of Rs 2.25 was sufficient on it

Miscellaneous Stamp Act Reference no. 104 of 1972 under s. 57(1) of the Stamp Act

N. L. Ganguly, for the Applicant.

S. C., for the Respondent.

C. S. P. SINGH, J.:—The Chief Controlling Revenue Authority has under s. 57(1) of the Stamp Act referred the following questions to us for answer:

“(1) Whether the document (Ann. 1) is an ‘instrument of partition’ as defined in s. 2(15) of the Indian Stamp Act and is chargeable with duty under Art. 45 of Sch. I-B thereof?”

(2) Whether the document under reference is already properly stamped with a duty of Rs.2.25?”

The facts necessary for an answer to these questions may be shortly stated. Siya Ram, Kailash Nath and Smt. Kunnan Devi executed a document on the 4th of September, 1969, in which there was a recital that the parties belonged to the same family and were owners of certain properties mentioned in the deed. It was further averred that the parties had partitioned the properties and had entered into separate possession of their shares on the 27th of March, 1969 and that subsequently a map showing the shares of the parties in the properties had been prepared. The document thereafter went on to recite that a part of the house which contained a passage, an *angan* and a well had not been partitioned and had been left joint. The occasion for executing the document was stated to be for avoiding future disputes between the descendants of the parties and also for the purpose that the document may serve as evidence of the partition that had been effected earlier. A stamp duty of Rs.2.25 was paid in respect of this document, and thereafter was presented before the Collector, Varanasi for determination of the stamp duty thereon. The Collector was not able to come to a definite conclusion regarding the nature of the document. He accordingly referred the matter to the Board under s. 56(2) of the Stamp Act.

Before the Board it was contended on behalf of the executants that the document in question was not an

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instrument of partition as defined under s. 2(15) of the Act, and support for this was sought from the two decisions of this Court in *Bhagwana v. Chaudhry Gulab Kuer* (1) and *Smt. Thekura v. Sukhraj Singh* (2). The Board, however, was of the view that the document was an instrument of partition as defined in s. 2(15) of the Stamp Act, and was chargeable to stamp duty under Art. 45, Sch. I-B thereof. The Board arrived at this view, in spite of coming to the conclusion that it was possible that the partition might have taken place earlier i.e. on the 27th of March, 1969. It sought support for its conclusion by referring to the definition of the word 'instrument' in s. 2(14) of the Act. In its view, even if a document recording the fact of partition is executed after the date of actual partition, it would still be an instrument of partition and liable to duty as such.

We are of the view that the Board of Revenue was in error in holding that the document in question was an instrument of partition. The first question that arises in this reference is covered by a Full Bench decision of this Court in *Bhagwana v. Chaudhry Gulab Kuer* (1) which has been referred to by the Board in its decision. The Board has not followed the decision, in spite of the fact that the decision was fully applicable to the facts of the present controversy. It was bound by the view expressed by the Full Bench and was in error in not deciding the matter in accordance with the decision of this court. This apart, the reasons given by the Board for holding that the document in question was an instrument of partition, are not sound. An instrument of partition has been defined in s. 2(15) of the Act. Before aid of this sub-section can be taken, the instrument must be one which is executed by co-owners, and the partition must be effected by that instrument. In the present case as the partition had already taken place earlier, and the parties had entered into separate posses-

(1) A.I.R. 1942 All. 220.

(2) 1958 All. 312

sion of their shares, they ceased to be co-owners of the properties over which they had taken over separate possession. Moreover, inasmuch as the present document only referred to the fact of partition having taken place earlier, it did not come within the purview of this sub-section. The reliance placed upon s. 2(14) of the Act is also erroneous. Before recourse to sub-s. (14) of s. 2 could be taken for the purpose of interpreting s. 2(15), it had to be seen as to whether the adoption of the meaning of the word 'instrument' given in s. 2(14) of the Act was consistent with the provisions of s. 2(15) of the Act. If the definition of the word 'instrument' as given in s. 2(14) is substituted in s. 2(15), an inconsistency would arise. It has been seen that s. 2(15) of the Act excludes documents other than those executed by co-owners, while the substitution of the meaning of the word 'instrument' as given in s. 2(14) would bring such documents within the purview of s. 2(15). Thus in view of the opening part of s. 2 of the Act, it is not possible to engraft the meaning of the word 'instrument' as given in s. 2(14) in s. 2(15) of the Act. Our conclusion, therefore, is that the document in question was not an instrument of partition as defined in s. 2(15) of the Act, and was not chargeable to duty under Art 45, Sch. I-B thereof.

So far as the second question is concerned, inasmuch as we have held that the document in question is not an instrument of partition, the stamp duty paid on it was proper.

Our answer to the first question is in the negative. As regards the second question the document is properly stamped with duty of Rs 2 25. We answer the reference accordingly.

Question answered,

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APPELLATE CIVIL

*Before Mr. Justice S. Chandra and Mr. Justice Gopi
Nath*

S. P. VERMA

APPELLANT,

v.

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May, 18.

REGIONAL DIRECTOR

... RESPONDENT

Employees' State Insurance Act, 1948, s. 2(12)—*Employees working outside the factory premises—Entitled to the benefits of the Act.*

If the requisite number of workers are engaged in work which is an integral part of the manufacturing process, though their work may be carried on at different places, they will not only be employees as defined in s. 2(g) of the Employees' Provident Fund but they should also be held to be working in the same factory.

F. A. F. O. no. 261 of 1970 against the order of Judge, E. S. I. Act Court, Aligarh, dated 29th April, 1970 in Case no. 3 of 1967.

Ramo Devi Gupta, for the Appellant.

B. N. Ashthana, for the Respondent.

S. CHANDRA, J.:—The Employees' State Insurance Act, 1948 applies to all factories. The question in this appeal is whether the appellant firm maintains a factory within the meaning of this Act and, if so, where its factory is located. The learned single Judge felt that the question has aroused divergence of judicial opinion in this country. There being no decision of this Court on the point the appeal was referred to a larger bench. That is how the appeal has been laid before this Bench.

The appellant is the managing proprietor of Verma Electric Company, Aligarh. This firm manufactures table lamps and brackets. The offices of the firm are situate in Mamu Bhanja, Aligarh. At this place the appellant employs thirteen to fourteen persons,

Hence the table lamps and brackets are manufactured. The appellant maintains another establishment at Madar Gate, Aligarh where seven persons are employed. At this place the lamps and brackets manufactured at Mamu Bhanja are polished up before being sent to the market.

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The Employees' State Insurance Corporation, being of the opinion that the appellant was maintaining a factory to which the Employees' State Insurance Act was applicable, demanded a contribution of Rs.600 for the period from 18th October, 1965 to 17th October, 1966. The appellant moved an application before the Employees' Insurance Court, Aligarh praying for a declaration that its firm was not a factory within meaning of the Act and was not liable to pay the contribution. The Corporation contested the application.

Before the Employees' Insurance Court the parties led evidence. The Court found that thirteen persons were employed at the workshop situate at Mamu Bhanja, while seven persons were employed at the workshop at Madar Gate. Manufacturing process at Mamu Bhanja was carried on with the help of a small machine worked with electrical energy. The two workshops together employed twenty persons. The employees at both the workshops had community of purpose towards the same finished product and its promotion in this business, and so they could be regarded as compliments of each other and should be considered together as one unit being engaged in one and the same business under the same management. On this view it was held that the appellant firm was maintaining a factory within the meaning of the Act, and so, liable to pay the contribution. Aggrieved, the firm came up to this Court in appeal under s. 82(2) of the Employees' State Insurance Act, 1948.

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The learned counsel for the appellant did not challenge the findings of fact before us. He, however, submitted that the appellant firm carried on its business at Mamu Bhanja. That place was not a factory as defined by the Act, because less than 20 persons were employed there. The ancillary workshop at Madar gate could not be taken into consideration in order to determine whether the appellant firm maintained a factory because it was situate neither in the same premises, nor did it have any geographical or physical unity with the premises at Mamu Bhanja.

S. 2(12) of the Act defines a factory to mean “any premises including the precincts thereof, where twenty or more persons are working, or were working at any time in the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power; or is ordinarily so carried on” So, any premises including the precincts thereof constitute a factory, if, twenty or more persons are working or were working thereon, and if, in any part thereof a manufacturing process is being carried on, with the aid of power. If these two conditions are satisfied, the premises including the precincts thereof constitute a factory although the manufacturing process is carried on in only a part of the premises.

The Employees’ State Insurance Act does not define the terms “premises” or “precincts”. The precise connotation of these terms should, in our opinion, be gathered in the light of the context, and the scheme and object of the Act. Assistance can also be taken from other enactments which may be in *pari materia* and which may provide useful guidance.

The object of the Employees’ State Insurance Act is to secure sickness, maternity, disablement and, in case of death, dependents’ benefits to the employees of fac-

tories and establishments. The benefit of this Act extends to employees of a factory even though they may be working outside the factory premises.

The Employees' Provident Fund Act (no. XIX of 1952) was enacted to make provision for the future of the industrial worker after he retires, and for his dependants in case of his early death. To this end the Act instituted Compulsory Contributory Provident funds. That Act applies *inter alia* to every establishment which is a factory, engaged in any industry specified in Sch. I and in which fifty or more persons are employed. By the Employees' Provident Fund (Amendment) Act (no. XLVI of 1960) the word 'fifty' was substituted by the word 'twenty' or more person, just as was the case in the Employees' State Insurance Act.

S 2(g) of the Employees' Provident Fund Act defines a factory to mean any premises including the precincts thereof in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power.

It will be seen that the common feature of a factory within the meaning of both the Acts was the phrase 'any premises including the precincts thereof'. The Employees' Provident Fund (Amendment) Act introduced s 2-A to the parent Act. It provides:

"2-A. *Establishment to include all departments and branches*—For the removal of doubts, it is hereby declared that where an establishment consists of different departments or his branches whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

Under the parent Act an establishment had to be a factory as defined by the Act, in order to attract its provisions. Thus by a declaratory legislation the Legisla-

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ture clarified its intention that the definition of the term factory was not confined to premises situate at a single place. It will include branches even though they were situate at different places. Since the Employees' Provident Fund Act is in *pari materia* with the Employees' State Insurance Act, we feel that the clarification of intention made by the 1960 amendment Act shows the legislative intent underlying the phrase "premises including the precincts thereof" was that it need not necessarily be confined to a single place, situate within the same compound.

The essential feature of a factory as defined under the State Employees' Insurance Act is that a manufacturing process is being carried on with the aid of power and by twenty or more persons. If the requisite number of workers are engaged in work which is an integral part of the manufacturing process, though their work may be carried on at different places, they will not only be employees as defined in s. 2(g), but they should also be held to be working in the same factory.

We feel that the ambit of the definition of the term 'factory' should not depend on what the employer, either for the sake of efficiency or convenience of management, or even with a view to avoid the application of the Act, may do. If for the sake of his convenience the employer diversifies the same manufacturing process and conducts it in different places, the workers should not lose the benefits of the Act merely for that reason, if the other conditions are satisfied; the other relevant factors being unity of ownership, management and control of the different places of work as well as the unity of employment. If these unities are established then the various places where parts of the same manufacturing process is carried on should, in our opinion, constitute a factory within the meaning of this Act.

The appellant firm manufactures table lamps and brackets. A part of the manufacturing process was carried on at its workshop at Mamu Bhanja, whereas the work of polishing the table lamps and brackets was done at the workshop situate at Madar Gate. Obviously, the work of polishing was a part of the manufacturing process. The manufacturing process was thus carried on at two places. The product, namely, the table lamps and brackets became a finished product ready for the market only after they had undergone the polishing work done at Madar Gate. There is no dispute that the appellant firm owned both the workshops. It controlled the work at both places. There is no evidence that the management at the two places was not the same. Clearly, there was unity of employment. On these facts, it appears to us that the two workshops together constituted a factory within the meaning of the Act.

In *H. Bhiwandiwala v. The State of Bombay* (1) it was held that the premises constituting a factory may be a building or open land or both.

In *Nagpur Electric and Power Company Ltd. v. The Regional Director* (2), it was observed that inside the same compound wall, there may be two or more premises. If those premises were used in connection with the manufacturing process they all may constitute a factory, and the other premises within the same compound wall if used for purposes unconnected with the manufacturing process, they may form no part of the factory. In that case the Nagpur Electric Company carried on the work of receiving and transmitting electrical energy in premises which were located within a compound wall. Inside the premises there were several buildings, yards and open spaces. The Company received electric energy in bulk of 11,000 volts. This energy was carried to its transformers and was stepped down to 3,300 volts and

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(1) A.I.R. 1962 S.C. 29,

(2) A.I.R. 1967 S.C. 1361,

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was then carried to sub-stations situate in various parts of the city, where it was again stepped down to 400 volts by other transformers. These sub-stations were situate at different places in the city outside the compound wall of the main premises of the Company. The Supreme Court held that the employees working in the sub-stations attended to work which was directly connected with the work of the factory at the main station. The sub-stations were not independent factories. The workers at the sub-stations were employees within the meaning of s. 2(9)(i) of the Act. S. 2(9)(i) of the Act defines an employee to mean any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere.

It is true that this decision is not a direct authority holding that the sub-stations constituted an integral part of the main factory premises. But the employees working at the sub-stations were held to be employees of the Company within the meaning of the Act. It was emphasised that the sub-stations were not independent factories. This would suggest that the court was inclined to include the sub-stations as being within the concept of a "factory" as defined in the Act. This would suggest that the term 'premises' including the 'precincts' used in the definition of a factory is not necessarily confined to buildings situate within one well defined compound.

In *N. V. Radhia v. Employees' State Insurance Corporation* (1) the firm manufactured iron safes at one place and did the work of painting them at a different place. The work of painting was held to be a part of

(1) A.I.R. 1967 Mad. 111,

the manufacturing process or incidental thereto. Both the places were held to constitute a factory.

The case of *V. Mohammad Haneef and Co. v. The Regional Director* (1) is also interesting. There the petitioner owned a tannery at Ranipet in North Arcot District wherein the several processes of tanning of hides and skins were carried on by manual labour. The premises where the tanning was carried on were enclosed with walls and within the premises the various processes of tanning were carried on. Water, which is essential to the various stages of the tanning processes was obtained from a well situate in an open space outside the compound wall of the tannery. Water was taken out of the well with the help of a pump worked by electric energy. Electric power was not used within the premises at any stage of the tanning processes. More than twenty people were employed in the process of tanning within the premises; but they had no access to the pumping set which was in charge of an independent caretaker. The Madras High Court observed that merely enclosing the premises of an establishment where more than twenty persons are employed, within boundary walls, and locating the place where power for the manufacturing process of the establishment is utilised, just outside or on adjoining land may not be sufficient to take the establishment out of the definition of 'factory', if all the other conditions are satisfied.

In *Employees' State Insurance Corporation v. Peter Sewing Machine Company* (2) the question was whether the premises were a factory. It was found that the entire work was conducted within a single building by more than twenty workmen, but they were employed by two independent employers. It was held that the premises did not constitute a factory, because there was no unity of ownership or occupation of the factory or

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(1) A.I.R. 1969 Mad. 155.

(2) A.I.R. 1970 Delhi 182.

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unity of employment. The only unity present was that of geographical or physical unity being confirmed to the premises including the precincts thereof. This decision is clearly distinguishable. The problem as to whether two or more buildings situate in different compounds would be a factory did not arise for consideration in that case. The observation that a factory must have a geographical or physical unity, being confined to its precincts, was merely an *obiter dictum*. In our opinion, this case is not an authority for the proposition that all the buildings must be situate within one compound before they can constitute a definite economic unit.

In *Swastik Textile Trading Co. Ltd. v. Union of India* (1) three separate buildings were situate in the same compound. They were together held to be a factory. In that case the question whether a building situate outside the common compound would be included within the concept of the term factory did not arise for consideration. This case is hence, not directly in point. The only principle decided was that the expression "premises including precincts thereof" takes within itself all buildings and precincts confined within a common compound.

In *Messrs. Hindustan Construction Co. Ltd. v. Employees' State Insurance Corporation* (2) it was held that an essential requisite of a factory was a premises, that is to say, a geographical area within a certain boundary. In that case the firm carried on the construction of piers for the Brahmaputra bridge at places which were not within one compound. It was held that the location of different units could not be said to be within a geographical limit so as to constitute the premises of a factory. For reasons already mentioned we are unable to accede to this restricted interpretation.

In our opinion, the Employees' Insurance Court was justified in holding that the appellant firm was maintaining a factory within the meaning of the Act and was, as such, liable to make the contribution.

The appeal is accordingly dismissed with costs

Appeal dismissed

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CRIMINAL REVISION

*Before Mr. Justice Omprakash Trivedi**
INDAL SINGH ... APPLICANT,

v.

STATE ... RESPONDENT.

Railway Property (Unlawful Possession) Act, 1966—Ss 8(2) and 9—Statements of witnesses recorded during enquiry under—Supply of copies to accused—Necessity of—Omission—Effect of—Code of Criminal Procedure, 1898, Chap. XIV, ss. 161, 162 and 173(4).

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June 5

All provisions contained in Chap. XIV of the Code apply to enquiry made by an Officer of the Railway Protection Force under the provisions of the Act, with the result that the Enquiring Officer will be subject to the provisions contained in ss. 161, 162 and 173(4) of the Code. Enquiring Officer under s. 173(4) of the Code read with s 8(2) of the Act, is under a statutory duty to furnish copies of statements of witnesses recorded by him during enquiry under s 9 of the Act to accused. Omission to supply of the copies vitiates the trial. In such a case prejudice is patent and will be presumed.

Purshottam Jothanand v. State Kutch (1), *Pulkuri Kottaya v. Emperor* (2), followed *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Vimal Dassi* (3), relied on. *Noor Khan v. State of Rajasthan* (4) and *Narayan Rao v. State of A. P.* (5), distinguished.

—, 1966 ss 8(2) and (9) and Code of Criminal Procedure, 1898, s. 162(2)—*Obtaining of signatures of witnesses on statements recorded during enquiry under s. 9—Propriety and effect of.*

*While sitting at Lucknow

(1) A.I.R. 1954 S.C. 700.

(2) A.I.R. 1947 P.C. 87

(3) A.I.R. 1968 Cal. 540.

(4) A.I.R. 1964 S.C. 286.

(5) 1957 S.C. 787

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An Officer of the Railway Protection Force carrying on enquiry under s. 9 of the Act is prohibited in view of s. 162(2) of the Code read with s. 8(2) of the Act, from obtaining signatures of witnesses on the statements recorded by him during enquiry. The obtaining of signature likely to create in the mind of witness produced for the prosecution a sense of commitment to the statement signed by him which seriously impares the value of evidence of that witness at trial.

Hiralal v State (1), dissented from

Zahiruddin v Emperor (2), relied on

Durga Prasad v. State (3), followed

Criminal Revision no 69 of 1972 against the judgment and order dated 20th January, 1972 passed by B. N. MISRA, III Temporary Civil and Sessions Judge, Lucknow in Criminal Appeal no 144 of 1971.

S. S. Saxena, for applicant.

S. N. Trivedi, for State.

O. P. TRIVEDI, J.:—This criminal revision has been filed by Indal Singh who along with two others Ram Gopal and Kripa Singh was prosecuted under s. 3 of the Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred to as the Act), the prosecution case being that he was found by Sub-Inspector O. N. Tewari of the Railway Protection Force to be in possession of brass bearings, the same being railway property. These brass bearings were recovered from their possession on arrest which was followed by three separate complaints being lodged against the present revisionist Indal Singh Ram Gopal and Kripa Singh by R. S. Sharma, Sub-Inspector, Railway Protection Force, before the Special Railway Magistrate, Lucknow, leading to three separate trials against them. The three cases were disposed of by the Magistrate by a single judgment finding them

(1) 1970 A.W.R. 82.

(2) A.I.R. 1947 P.C. 75.

(3) 1971 A.W.R. 175.

guilty of an offence punishable under s. 3 of the Act and each of them was sentenced to rigorous imprisonment for one year and to a fine of Rs.1,000. Against his order three separate appeals were filed which were heard by Sri B. N. Misra, 3rd Temporary Civil and Sessions Judge, Lucknow. He disposed of the three appeals by one judgment and allowed the appeals on the sole ground that the Magistrate had committed an irregularity in deciding the three cases by a single judgment. Their convictions and sentences were set aside and the cases were remanded to the Magistrate for disposal of the three cases separately. This order of the Sessions Judge is challenged by Indal Singh in this revision on the following grounds: It is urged that the case should not have been remanded by the appellate court firstly because the officer of the Force who made enquiry into the offence, under s. 9 of the Act, recorded the statements of witnesses and obtained the signatures of the witnesses on the statements in contravention of the prohibition contained in s. 162 of the Code of Criminal Procedure (hereinafter referred to as the Code) and secondly because the copies of statements of the witnesses, recorded at the enquiry, were not supplied to the revisionist and, it is submitted, on account of these infirmities no reliance could be placed on the evidence produced at the trial, the case should not have been remanded to the Magistrate for retrial. These two points were urged before the Sessions Judge, also. The learned Sessions Judge found that signatures of the witnesses had in fact been obtained by the Inquiry Officer on their statements during the enquiry, but this was a mere irregularity and did not render the evidence of the witnesses at the trial inadmissible. On the second point he expressed the opinion that officer of the Railway Protection Force was not a police officer within the meaning of s. 251-A of the Code and, therefore, held

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1972 that the revisionist was not entitled to receive copies of
INDAL SINGH statements of the witnesses recorded by the officer of the
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On hearing the learned counsel for the revisionist and the Deputy Government Advocate I am of the opinion that the learned Sessions Judge grievously erred in the decision of these two points which were raised before him.

Before I start with the discussion on the points, it may be mentioned here that admittedly copies of the statements of witnesses, recorded by the Sub-Inspector of the Railway Protection Force under s. 9 of the Act, were not supplied to the applicant before commencement of the trial. The applicant thereupon moved an application before the trying Magistrate praying for supply of these copies. The application was rejected by the Magistrate on the ground that there was no provision under which the accused could claim copies of the statements of witnesses recorded under s. 9 of the Act. The first question that should have engaged attention of the learned Sessions Judge was whether the applicant was entitled to receive copies of the statements of witnesses recorded by the Inquiry Officer, under s. 9 of the Act, before commencement of the trial and whether if these copies had not been supplied to him before the commencement of the trial he could claim that the same be supplied to him by the trying Magistrate. The learned Sessions Judge appears to have confined his attention solely to the second question whether the applicant was entitled to receive copies of the statements of witnesses (recorded during the enquiry) from the trying Magistrate and appears to have completely overlooked the question whether he was entitled to supply of copies of those statements from the Inquiring Officer before the commencement of the trial. He

does not seem to have addressed himself at all to this question. Under the scheme of the Code in respect of the statements of witnesses recorded under Chap. XIV of the Code the first stage when the statements of witnesses recorded during the investigation should be supplied to the accused is before the commencement of the trial under s. 173(4) of the Code. If the copies are not supplied to the accused by the police under s. 173(4) of the Code before commencement of the trial and if the case is instituted on a police report then there is a second stage when under the scheme of the Code the copies must be supplied to the accused and that is under s. 251-A(1) of the Code. At the second stage the copies are supplied by the Magistrate. If the case is triable by the Court of Session and the proceeding is instituted on a police report, the Magistrate is under an obligation to supply copies of documents, referred to under s. 173 of the Code, to the accused if he finds that the same have not already been supplied to him. It follows, therefore, that in respect of investigations made in accordance with Chap. XIV of the Code the Investigation Officer is under a duty to supply copies of the statements of witnesses, recorded during the investigation of the case, before commencement of the trial and in cases instituted on a police report these copies, if not supplied before commencement of the trial, have to be supplied by the Magistrate. The question arises whether the applicant was entitled to be supplied with copies of the statements of witnesses recorded by the Sub-Inspector of the Railway Protection Force, who made the inquiry under s. 9 of the Act, before commencement of the trial. This aspect of the matter does not, to my mind, present any difficulty in view of s. 8(2) of the Act which reads:

“For this purpose the officer of the Force may exercise the same powers and shall be subject to

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the same provisions as the officer incharge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case."

Under sub-s. (1) of s. 8 of the Act when any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under s. 7, he shall proceed to inquire into the charge against such person. Sub-s. (2) of s. 8 of the Act makes it clear that an officer of the Force, making an enquiry into the charge against such person, shall be subject to the same provisions as incharge of a police station and may exercise and shall be subject to the same provisions under the Code as when he is investigating a cognizable case. The clear import of s. 8(2) of the Act is that an officer of the force making enquiry into an offence punishable under the Act shall exercise the same powers and shall be subject to the same duties and establishes as an officer incharge of a police station is under the provisions contained in Chap. XIV of the Code when investigating a cognizable case. It follows, therefore, that all the provisions contained in Chap. XIV of the Code apply to enquiry made by an officer of the Force under the provisions of the Act, with the result that the Inquiring Officer will be subject to the provision contained in ss. 161, 162 and 173(4) of the Code. Sub-s. (4) of s. 173 of the Code imposes a duty on the officer incharge of a police station to furnish or cause to be furnished to the accused the statements, recorded under sub-s. (3) of s. 161 of all the persons whom the prosecution proposes to examine as its witnesses. The officer of the Force conducting the enquiry under the Act may be under no obligation to submit a report to a Magistrate in accordance with s. 173(1)(a) of the Code in view of the fact that s. 5 of the Act provides that an

offence under this Act shall not be cognizable, with the result that the Magistrate takes cognizance of the offence punishable under the Act upon a complaint and not upon a police report but this circumstances alone does not absolve the Inquiring Officer from the duty cast upon him under the last part of sub-s. (1) of s. 173 of the Code, because under s. 8(2) he is subject to the same duties and obligations with which the officer of a police station will be saddled when carrying on investigation of cognizable offences under Chap. XIV of the Code. In this view of the matter and in view of the last part of sub-s. (4) of s. 173 of the Code I have no doubt that the Inquiring Officer is under a statutory duty to furnish copies of the statements of witnesses recorded by him under s. 9 of the Act which include s. 8(2) of the Act and which will be deemed statements recorded under sub-s. (3) of s. 161 of the Code. S 156 of the Code empowers the officer incharge of a police station to investigate any cognizable case falling within his statutory jurisdiction, but the police officer may investigate a non-cognizable case also upon the order of a Magistrate in accordance with s. 155(2) of the Code and when he does so he exercises all the powers and is subject to all the duties and liabilities contained in the provisions of Chap. XIV of the Code. In the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal v Vimla Desai* (1), his Lordship of the Calcutta High Court while dealing with a case of which cognizance had been taken on a complaint under s. 190 of the Code made observations which have relevance for the present discussion. All the cases were initiated on complaints although all of them were preceded by police investigations held under Chap. XIV of the Code on permission to investigate being obtained from the Magistrate under s. 151(2) of the Code. After investigations in those cases no reports under s. 173 of the

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Code were, however, filed and cognizance was taken on complaints filed by persons authorised by the Central Government under s. 5 of the Imports and Exports (Control) Act. As the cases were not treated as instituted on police report the procedure specified in s. 251-A of the Code was not followed. The cases were treated as falling under cl. (b) of s. 251 "any other case" of the Code and the procedure laid down in ss. 252 to 259 was followed. The question arose whether when cognizance is taken on the basis of a complaint under s. 190(1)(a) of the Code in a case of which investigation was held under Chap. XIV of the Code but wherein no report under s. 173 of the Code was filed, the accused should be entitled to the benefit of s. 173(4) of the Code and entitled to the copies of documents referred to in the section. His Lordship held that even in a case relating to a non-cognizable offence of which investigation was made by the police under orders of the Magistrate where no police report was filed under s. 173(1) of the Code but cognizance was taken on a complaint, the accused is entitled to the benefit of receiving copies of the statements of the witnesses recorded under s. 161(3) of the Code by virtue of s. 173(4) of the Code. The following observations made and with which I am in respectful agreement are in point. It was observed:

"An investigation under Chap. XIV must lead up to a report under s. 173 giving rise immediately to a liability in the police officer concerned to furnish copies of certain documents to the accused and giving rise at the same time to a corresponding right in the accused to get such copies. If the police officer without submitting a report under s. 173 makes over the materials collected by him to some other authority or person to enable

that authority or person to file a complaint, that may be done if only the law permits. The law may permit the filing of a complaint by another authority or person in the case, but law would not permit remissness on the part of the police officer in the matter of submitting his report under s. 173(1) of the Code. That is a mandatory duty of the police officer concerned. Even if the police officer does not do his duty, that would not take away the right of the accused to get copies. The duty to furnish copies will be transferred to the prosecutor who would benefit by the result of the investigation.

Ss. 251-A and 252 do not contain the relevant considerations in deciding the question as to whether the accused should be furnished with copies of documents in cases wherein cognizance to taken on the basis of a complaint, but where investigation has been held under Chap. XIV of the Code for the purpose of collecting materials for the complaint that in subsequently filed, the relevant consideration is to be found in the provisions of s. 173 of the Code. The amendment of 1955 has conferred on the accused persons in cases arising out of police reports submitted after Police Investigation two distinct benefits in this regard, namely, (1) it has simplified the procedure for the exercise by an accused of his statutory right under s. 145 of the Evidence Act and under s. 162 of the Code of Criminal Procedure, and (2) a simple benefit arising out of a prior knowledge of all the evidence that would appear against him at the trial. A failure to supply copies of documents in cases such as these would mean a virtual denial of the above right of the accused, and if not a denial at least a clog on that right which it would be

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difficult to get round and which would also mean a denial of a prior knowledge of the evidence that might be used against the accused at the trial. "

In view of the express provision contained in s. 8(2) of the Act which makes it clear that an officer of the Force, making inquiry into the offences punishable under the Act, shall exercise the same powers and shall be subject to the same duties and liabilities as an officer incharge of the police station carrying on investigation into cognizable offences under Chap. XIV of the Code, it is clear to me that the position of an Inquiring Officer is at par with the position of a police officer investigating a case of a non-cognizable offence under the order of the Magistrate under Chap. XIV of the Code. I, therefore, hold that the Inquiring Officer was bound to supply copies of the statements of witnesses, recorded during the inquiry, to the applicant in terms of s. 173(4) of the Code before commencement of the trial.

The question, however, arises whether having failed to receive copies of statements of witnesses from the Inquiring Officer before commencement of the trial, the applicant was entitled to receive them during the trial and whether this prayer made to the Magistrate in writing was rightly refused. The learned Sessions Judge appears to have rivetted his attention to the sole question whether s. 251-A of the Code applied to the case and whether the applicant was entitled to receive copies of the statements of the witnesses at the trial under that provision. To my mind it was not necessary to decide whether the case could be treated as instituted on a police report so as to attract the provisions contained in s. 251-A, nor was it necessary to determine whether the person, who made the complaint was a police officer. It may well be that he is not a police officer and that the case could not be regarded

as instituted on a police report and s. 251-A did not apply, but it is not necessary to express opinion on these questions in view of the position that the Inquiring Officer was bound under s. 173(4) of the Code, having regard to the provision contained in s. 8(2) of the Act, to supply a copies of the documents to the accused before commencement of the trial and in view of the fact that there is other provision contained in the Code which confers on the accused-applicant similar benefit Here the learned Sessions Judge appears to have overlooked the provision contained in s. 257(1) of the Code which reads as follows:

“ If the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.”

It is clear from s. 257(1) of the Code that the accused is entitled to apply to the Magistrate for issue of process for production of any document or the copies of the statements of witnesses recorded during the enquiry, as in the present case, and such a request could be turned down only on specific grounds laid down in s. 257 of the Code being recorded in writing. The application for supply of copies could thus be treated by the Magistrate as one under s. 257(1) of the Code and the copies or the documents ordered to be produced. The prayer for supply of the documents was not refused on the

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ground that the prayer was motivated by vexation or delay or to defeat the ends of justice. The learned Sessions Judge, therefore, is in error in thinking that there was no provision in the Code other than s. 251-A of the Code under which copies of the statements of the witnesses could be supplied to the applicant at the trial. The fact, therefore, remains that the applicant was not supplied with copies of the statements of witnesses either during the stage of enquiry before the commencement of the trial or during the trial.

The provisions of s. 162 of the Code confer on the accused a valuable right to contradict a witness with reference to his previous statement recorded during the investigation. The applicant has been deprived of this valuable right because copies of the statements of the witnesses were not supplied to him at any stage. When the copies of the statements of the witnesses, recorded during the investigation, were not supplied to the accused at any stage, prejudice is patent and may well be presumed. Indeed, this is an omission which vitiates the trial.

In the case of *Purshottam Jothanand v. The State of Kutch* (1), their Lordships observed:

“The right which the accused has got of obtaining copies of the statements made by witnesses during investigation is a very valuable right and that the wholesale refusal to grant the same will be a serious irregularity which would vitiate the entire trial.”

It may be noted that in that case also, as here, copies of statements of the witnesses were not supplied to the accused before commencement of the trial and they were refused to be supplied at the trial when he made a request for their supply.

(1) A.I.R. 1954 S.C. 700

In the case of *Pulukuri Kottaya v. Emperor* (2) the Privy Council held that where the statements were never made available to the accused an inference, which is almost irresistible, arises of prejudice to the accused. This, however, has to be distinguished from cases where the statements of witnesses may not have been supplied to the accused at proper time, for instance, they may not have been supplied to the accused before commencement of the trial but may have been supplied to him at the trial. In cases of the latter kind a question may arise whether the trial has been conducted in a manner substantially prescribed by the Code. If the copies of statements of the witnesses in the case were not supplied before commencement of the trial but during the trial then it cannot be said that trial was conducted in a manner different from that prescribed by the Code, but rather it would be a case of the trial being conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct and, therefore, in cases of the latter category the question arises whether prejudice was caused to the accused on account of this irregularity and whether the same was curable under s. 537 of the Code. In the instant case, however, it is clear that the trial was conducted in a manner different from that prescribed by the Code, in that copies of the statements of the witnesses were not supplied to the accused at any stage. That being so, as held by the Supreme Court in the above case and as held by the Privy Council in the case of *Pulukuri Kottaya v. Emperor* (1) the trial is bad.

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In the case of *Noor Khan v. State of Rajasthan* (2), the Supreme Court observed:

“The provisions of s. 162 provide a valuable safeguard to the accused and denial thereof may be justified only in exceptional circumstances. The

(1) A.I.R. 1947 P.C. 67.

(2) A.I.R. 1964 S.C. 286.

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provisions relating to the record of the statements of the witnesses and the supply of copies to the accused so that they may be utilised at the trial for effectively defending himself cannot normally be permitted to be whittled down, and where the circumstances are such that the Court may reasonably infer that prejudice has resulted to the accused from the failure to supply the statements recorded under s. 161 the Court would be justified in directing that the conviction be set aside and in a proper case to direct that the defect be rectified in such manner as the circumstances may warrant. It is only where the Court is satisfied, having regard to the manner in which the case has been conducted and the attitude adopted by the accused in relation to the defect, that no prejudice has resulted to the accused that the Court would, notwithstanding the breach of the statutory provisions, be justified in maintaining the conviction."

In this case and in the case of *Narayan Rao v. State of Andhra Pradesh* (1) in which the Supreme Court observed that the provisions contained in s. 173(4) and s. 207-A of the Code of Criminal Procedure were not mandatory and the trial did not stand vitiated for non-compliance of this provision unless prejudice was shown to have been caused to the accused, their Lordships were dealing with cases in which copies of statements of witnesses recorded by the police officer had in fact been supplied to the accused at the trial. In the case of *Noor Khan* the statements of witnesses were not recorded by the Investigating Officer in detail but the Investigating Officer had made jottings or notes of the statements of witnesses and the copies of the statements of the witnesses which were supplied to the accused at

(1) A.I.R. 1957 S.C. 787.

the trial had been prepared from these jottings or notes. The question, therefore, was whether there had been a substantial compliance with the provision that the accused must receive copies of statements of witnesses prepared during investigation. Their Lordships held, on the facts that there had been a substantial compliance with the provision and it is in that context that they observed that the trial did not stand vitiated in the absence of proof of prejudice to the accused by the fact that full and detailed statements had not been supplied. In the case of *Narayan Rao* (1) also while copies of statements of witnesses recorded during investigation were not supplied before commencement of the trial they were supplied during the trial. That was, therefore, not a case where copies of statements were not supplied to the accused at any stage and in that case also, therefore, their Lordships were dealing with the question as to whether the trial will stand vitiated merely because the copies of statements of witnesses were not supplied before commencement of the trial although supplied subsequently at the trial stage. In these two later cases their Lordships were not dealing with a case where copies of statements of the witnesses were not supplied to the accused at any stage. Such a case came up before their Lordships in *Purshottam Jethanand v. The State of Kutch* (2) which provides a parallel to the instant case. The revisionist has been deprived of a valuable right to effectively cross-examine the witnesses who were produced for the prosecution from the failure to supply copies of statements of those witnesses during the inquiry and trial. I, therefore, conclude that there was manifest prejudice caused to the revisionist by this omission and failure to comply with the statutory provision and it vitiated the trial.

(1) A.I.R. 1957 S.C. 787.

(2) A.I.R. 1954 S.C. 700.

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Coming to the second point, admittedly the inquiry officer had obtained signatures of the witnesses on the statements recorded by him during the inquiry. S. 162 (1) of the Code of Criminal Procedure contains an express prohibition against the obtaining of signature of a witness by the police officer on the statement recorded during investigation under Chap XIV of the Code. In view of s. 8(2) of the Act the officer of the Railway Protection Force shall be subject to the same duties as the officer incharge of a police station exercising jurisdiction under the Code of Criminal Procedure when investigating a cognizable case. It follows, therefore, that an officer of the Force carrying on inquiry of a cognizable case under Chap XIV of the Code is subject to and bound by the provision contained in s. 162(1) of the Code. In other words, such an officer of the Force carrying on inquiry is prohibited in view of s. 162(2) of the Code read with s. 8(2) of the Act, from obtaining signature of a witness on the statement recorded by him during an inquiry. As held by their Lordships of the Privy Council in the case of *Zahiruddin v. Emperor* (1) the value of the evidence of such witnesses whose signatures were obtained during inquiry is seriously impaired as a consequence of contravention of this statutory safeguard against the improper practice. It is this aspect of the Sessions Judge.

I respectfully agree with the view expressed by H. C. P. TRIPATHI, J in the case of *Durga Prasad v State* (2) to the effect that s. 162 of the Code of Criminal Procedure applies with full force to inquiry proceedings held by an officer of Railway Protection Force under the aforesaid Act. The evidence of the witnesses whose statements were not supplied to the revisionist may not for that reason have become inadmissible because the previous statements were not put to the wit-

(1) A.I.R. 1947 P.C. 75.

(2) 1971 A.W.R. 175.

nesses when they deposed at the trial but that did not distinguish the case of Durga Prasad from the instant case because the essential question was whether there was breach of the mandatory provision contained in s. 162(1) of the Code which prohibited the taking of signature of the person whose statement was recorded during investigation. The question was what was the legal consequence of the breach of this provision by the Inquiry Officer and not whether the statements of the witnesses recorded at the trial were rendered inadmissible. The learned Sessions Judge appears to have concentrated his attention on the question of admissibility of the statements of witnesses which was wholly irrelevant. He should instead have tried to determine whether s. 162(1) of the Code was applicable where there was a breach of that provision by the Inquiry Officer and if so how did it affect the prosecution evidence. It is this erroneous approach of the learned Sessions Judge which landed him into a wrong conclusion that *Durga Prasad's* case (1) was not applicable. *Durga Prasad's* case (1) was applicable because it was held that s. 162 of the Code applied to the inquiry proceedings held by an officer of the Railway Protection Force under the Act. This was based on the Privy Council decision in *Zahiruddin v. Emperor* (2). The Sessions Judge also referred to the decision in the case of *Hiralal v. State* (3). In that case MOHAMMAD HAMID HUSAIN, J. took the view that an officer of the Railway Protection Force commits no illegality if he obtains the signatures of witnesses during inquiry and s. 162 of the Code is not applicable. With profound respects I am unable to agree with the view expressed in that case because the attention of the learned Judge was not drawn to the provision contained in s. 8(2) of the Railway Property (Unlawful Possession) Act which made it clear that an

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(1) 1971 A.W.R. 175.

(2) A.I.R. 1947 P.C. 75.

(3) 1970 A.W.R. 32 (Journal)

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officer of the Force may exercise the same powers and will be subject to the same provisions as the Officer In-charge of a police station while investigating a cognizable offence. The provision of s. 8(2) of the Act made it clear than an officer of the Railway Protection Force was subject to the provision contained in s. 162(1) of the Code containing a prohibition against the obtaining of signatures of witnesses during inquiry. It is, therefore, clear that s. 162(2) of the Code is applicable to inquiries made by an officer of the Railway Protection Force in respect of cognizable offences under Chap. XIV of the Code in respect of offences punishable under the Act. That being so, he cannot obtain signatures of the witnesses examined by him during inquiry and if he does so, as in the instant case, he would be guilty of breach of the provision contained in s. 162(1) of the Code. A sound rule of public policy underlies the prohibition against signature of a witness contained in s. 162(1) of the Code. It is that the witness should not feel committed or bound to a particular statement recorded by an officer of the Railway Protection Force during inquiry on which his signature has been obtained and for that reason he should not feel bound to repeat that statement at the trial. The obtaining of signatures of the witnesses, therefore, was likely to have created in the mind of the witnesses produced for the prosecution in this case a sense of commitment to the statements signed by them. This seriously impaired the value of the evidence of these witnesses at the trial in the words of the Privy Council in the case of *Zahiruddin* (1) and no reliance could, therefore, be safely placed upon such evidence. For this reason as well as for the omission to supply the revisionist with copies of statements of witnesses recorded during inquiry no trust could be placed on the evidence which was led in for the prose-

(1) A I.R. 1917 P.C. 75.

cution in support of the charge against the revisionist and it is for these reasons that the order of remand was wholly improper. The proper order to pass was to set aside the revisionist's conviction and sentence under s. 3 of the Act.

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Finally, I cannot help observing that the learned Sessions Judge disposed of all the three criminal appeals of Indal Singh, Kripa Singh and Ram Gopal, which arose out of separate trials by a single judgment thereby betraying ignorance of the elementary procedure that each criminal appeal should be disposed of by a separate judgment. In this the learned Sessions Judge fell into the same error which he had commented upon in the order of the Magistrate.

For the reasons stated this revision is entitled to succeed. The revision is accordingly allowed. The order passed by the 3rd Temporary Civil and Sessions Judge, Lucknow, dated January 20, 1972 is set aside and the conviction and sentence of Indal Singh under s. 3 of the Railway Property (Unlawful Possession) Act, 1966 by the trial Magistrate are set aside. He is acquitted of the charge.

Revision allowed.

APPELLATE CIVIL

*Before Mr. Justice S. Chandra and Mr. Justice
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U. P. Industrial Disputes Act, 1947, ss. 6-E(2) and 6-E
*Pendency of bonus dispute—Dismissal of employee without
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S. 6-F gives a right to the aggrieved workman to make a complaint to Labour Court or Industrial Tribunal if the provisions of s. 6-E have not been complied with and thereby achieve the same object which could be achieved on a reference under s. 4-K of the Act. Non-compliance of requirement of s. 6-E of the Act only enable the aggrieved workman to make a complaint under s. 6-F of the Act and not of rendering the order of punishment invalid on this ground alone.

From a perusal of the Act it is apparent that it does not prescribe any period of limitation for making a complaint under s. 6-F. Even so the complainant is expected to approach the Tribunal within a reasonable time but simply because the complainant is guilty of laches it does not affect the jurisdiction of the Tribunal to entertain the complaint and condone the laches.

Special Appeal no. 377 of 1964 connected with Special Appeal no. 498 of 1964 against the judgment and order of D. D. SETH, J. in Writ Petition no. 2768 of 1959 decided on 27th March, 1964.

K. P. Agarwal, for the Appellant.

N. D. OJHA, J.—These two appeals are directed against the judgment of a learned single Judge, dated 27th March, 1964 in Civil Miscellaneous Writ Petition no. 2768 of 1959. Paras Nath Misra is the appellant in Special Appeal no. 377 of 1964 whereas Special Appeal no. 498 of 1964 has been filed by the U. P. State Industrial Tribunal and the State of U. P. Paras Nath Misra was employed as a Darban in the establishment at Allahabad of Amrit Bazar Patrika Private Ltd. The State Government referred an industrial dispute in regard to bonus between Amrit Bazar Patrika Private Ltd. herein referred to as the Company and its employees on 16th December, 1957. The Industrial Tribunal, Allahabad gave its award which was published on 21st March, 1958. Since it became enforceable on the expiry of 30 days of the date of its publication the proceedings would be taken to have remained pending by virtue of s. 6-D of the U. P. Industrial Disputes Act.

(Act 28 of 1947, hereinafter referred to as the Act, from 16th December, 1957 to 20th April, 1958.

During the pendency of the aforesaid dispute the company charge-sheeted Paras Nath Misra on 28th January, 1958 for disobedience and insolvent behaviour. He was suspended with effect from 29th January, 1958 and in pursuance of departmental enquiry that took place subsequently he was dismissed with effect from 29th January, 1958. This order was communicated to Paras Nath Misra *vide* letter dated 20th March, 1958.

Paras Nath Misra filed a complaint under s. 6-F of the Act making a grievance of the fact that the order of his dismissal was in contravention of the provision of s. 6-E(2) of the Act. The case set up by Paras Nath Misra was that since an industrial dispute was pending before the Industrial Tribunal at the time when the order of dismissal was passed the said order was illegal inasmuch as neither he had been paid wages for one month nor had an application been made by the company to the Industrial Tribunal for approval of the action taken by it as required by s. 6-E(2) of the Act.

The claim of Paras Nath Misra was contested by the Company but was allowed by the Tribunal by its order dated 24th August, 1959 whereby the order of dismissal of Paras Nath Misra was held to be null and void and he was directed to be reinstated with benefits of continuity of service. The company was also directed to pay to Paras Nath Misra half of the wages and allowances that he would have earned for the period he had remained out of employment. Aggrieved, the company filed the aforesaid writ petition in this Court. The learned single Judge came to the conclusion that non-compliance of the provisions of s. 6-E(2) of the Act was a mere technicality in the instant case and the Tribunal was wrong in setting aside the order of dismissal on

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this ground. He also held that after the Tribunal had found that the provisions of s. 6-E(2) had been violated it was its duty to have decided the dispute between the parties on merits. He, however, did not refer back the matter to the Tribunal on the ground that Paras Nath Misra was guilty of latches in making the complaint under s. 6-F of the Act and the Tribunal was in error in entertaining it. On this finding the learned single Judge allowed the writ petition and quashed the award of the Tribunal by his order dated 27th March, 1964. Hence these two appeals.

Two contentions were raised on behalf of the appellant.—(1) that no limitation had been provided for in the Act for making an application under s. 6-F of the Act and it being within the discretion of the Tribunal to entertain an application even though it was belated and the Tribunal in the instant case having entertained the complaint the learned single Judge committed an error in interfering with that discretion, and (2) that once it was established that the provisions of s. 6-E(2) of the Act had been violated, no further enquiry was called for and the order of dismissal of Paras Nath Misra had rightly been set aside by the Tribunal.

We are in agreement with the submissions made by the learned counsel for the appellant on the first point. From a perusal of the Act it is apparent that it does not prescribe any period of limitation for making a complaint under s. 6-F. Even so the complainant is expected to approach the Tribunal within a reasonable time but simply because the complainant is guilty of latches it does not affect the jurisdiction of the Tribunal to entertain the complaint and condone the latches. In the instant case the Tribunal having entertained the complaint it would be deemed to have condoned the latches and in a matter like this which was essen-

ually one of discretion, the order of the Tribunal did not deserve to be set aside by this Court in the exercise of its equitable jurisdiction under Art. 226 of the Constitution unless the order of the Tribunal was arbitrary. In *Calcutta Corporation v. Mulchand* (1) the Supreme Court held as follows:

"It is a well-settled principle that when the Legislature entrusts to an authority the power to pass an order in its discretion, an order passed by that authority in exercise of that discretion is, in general, not liable to be interfered with by an appellate court, unless it can be shown to have been based on some mistake of fact or misapprehension of the principles applicable thereto."

Nagpur Corporation v. Nagpur Handloom Cloth Market Co. (2) was a case in which a writ petition had been entertained by the High Court even though the petitioner was guilty of latches. It was urged before the Supreme Court that the ground upon which the High Court condoned the latches was inadequate. This argument was repelled by the following observations:

"This ground may appear to us inadequate, but the High Court has exercised its discretion in holding that the petition notwithstanding the delay should be entertained and we are unable in a matter essentially of discretion to set aside the judgment of the High Court on this ground alone,"

In this view of the matter we are of the opinion that the finding of the learned single Judge whereby he interfered with the discretion of the Tribunal in entertaining the complaint under s. 6-F of the Act notwithstanding the fact that it was made with considerable delay, cannot be upheld.

(1) A.I.R. 1956 S.C. 110.

(2) A.I.R. 1963 S.C. 1102.

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In regard to appreciate the submissions made by the learned counsel for the appellant on the second point it is necessary to consider the relevant provisions of s 6-E(1) and s 6-E(2) of the Act which runs as follows:

6-E(1) During the pendency of any conciliation proceedings before a Conciliation Officer or a Board or of any proceeding before a Labour Court or Tribunal in respect of an industrial dispute, no employer shall—

(a) in regard to any matter connected with the dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding, or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the Standing Orders applicable to a workman concerned in such dispute—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding, or

(b) for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3)

(4)

(5)

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It was conceded by the learned counsel for the appellant that the order of dismissal of Paras Nath Misra was passed for misconduct not connected with the dispute which was pending before the Tribunal between 16th December, 1957 and 20th April, 1958 and, therefore, it is sub-cl (2) and not sub-cl. (1) of s. 6-E which is relevant for our consideration. Learned counsel laid emphasis on the proviso to sub-cl. (2) and contended that the requirements of the said proviso were mandatory and inasmuch as Paras Nath Misra had neither been paid wages for one month nor had an application been made by the company to the Industrial Tribunal for approval of the action taken by it the order of dismissal was liable to be set aside on this ground alone and it having not been disputed that none of the two conditions contained in the aforesaid proviso were fulfilled the Tribunal was justified in giving the award as it did. It was urged that after having found that the conditions of the aforesaid proviso had not been fulfilled it was not necessary for the Tribunal to have entered into the merits of the order of dismissal and the learned single Judge erred in quashing the award of the Tribunal by taking a contrary view.

Learned counsel for the appellant relied upon certain observations made in the case of *Kalyani (P. H.) v. Air France, Calcutta* (1) but in our opinion this case has no bearing upon the question which falls for our consi-

(1) 1963 (1) Labour I J 679

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deration. Reliance was next placed and with considerable emphasis, upon the following observations made in *Straw Board Manufacturing Co. v. Govind* (1), in regard to the interpretation of the proviso to s. 33(2)(b) of the Industrial Disputes Act, 1947 (Act XIV of 1947) which is in *pari materia* with s. 6-E(2) of the Act :

“As we read the proviso, we are of opinion that it contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payment of wages, and (iii) making of an application for approval, to be simultaneous and to be part of the same transaction, so that the employer when he takes action under s. 33(2) by dismissing or discharging the employee, should immediately pay him or offer to pay him wages for one month and also make an application to the Tribunal for approval at the important time.”

We are however unable to accept the aforesaid submission. The relevant provisions of sub-ss (1) and (2) of s 33 of the Industrial Disputes Act, 1947 (Act XIV of 1947) (hereinafter referred to as the Central Act) after its amendment by Act XXXVI of 1956 are identical with sub-ss (1) and (2) of s 6-E of the Act and need not be reproduced. S. 33 of the Central Act before it was amended by Act XXXVI of 1956 was as follows :

33 During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall—

(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(1) AIR 1962 SC 1500,

(b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the Conciliation Officer, Board or Tribunal, as the case may be.

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In *Automobile Products of India v. Ruknaji Bala* (1) their Lordships of the Supreme Court while interpreting s. 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 which is in *pari materia* with s. 33 of the Central Act quoted above held that before setting aside an order of dismissal for non-compliance of the provisions of s. 22 it was incumbent upon the authority to whom a complaint has been made in this behalf to decide the merits of the case also after it had found that the provisions of s. 22 had not been complied with.

The aforesaid case was relied upon in *E Coal Co v. Algu Singh* (2) wherein it was observed :

"In an enquiry held under s. 23, two questions fall to be considered: Is the fact of contravention by the employer of the provisions of s. 22 proved? If yes, is the order passed by the employer against the employee justified on the merits? If both these questions are answered in favour of the employee the Appellate Tribunal would no doubt be entitled to pass an appropriate order in favour of the employee. If the first point is answered in favour of the employee, but on the second point the finding is that, on the merits, the order passed by the employer against the employee is justified, then the prejudice of s. 22 proved against the employer may ordinarily be regarded as a technical breach and it may not, unless there are compelling facts in favour of the employee, justify any substantial order of compensation in favour of the employee. It is un-

(1) AIR 1955 S.C. 258.

(2) AIR. 1958 S C. 761.

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necessary to add that, if the first issue is answered against the employee, nothing further can be done under s. 23."

Punjab National Bank v. A. I. P. N. B. E. Federation
 (1) was a case under s. 33 of the Industrial Disputes Act and while interpreting its scope Mr. Justice GAJENDRA-GADKAR speaking for the Court held:

"Thus there can be no doubt that in an enquiry under s. 33-A the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of s. 33 by the employer. If such contravention is proved it would still be open to the employer to justify the impugned dismissal on the merits. That is a part of the dispute which the Tribunal has to consider because the complaint made by the employer is treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered under s. 33-A. Therefore we cannot accede to the argument that the enquiry under s. 33-A is confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of s. 33 has been proved or not."

In view of the law laid down by the Supreme Court there is no manner of doubt that once the Tribunal had come to the conclusion that the company had failed to comply with the requirement of s. 6-E(2) of the Act it was incumbent upon it to have proceeded to decide the dispute on merits and its finding to the contrary suffers from a manifest error of law.

The learned counsel for the appellant, however, argued that the provisions of s. 33 of the Central Act as they stood before the said Act was amended by Act XXXVI of 1956 and as they stand thereafter are mate-

ually different and the aforesaid cases being under the unamended s. 33 will not apply to the amended section which is in *pari materia* with s. 6-E of the Act as brought on the statute book by the U. P. Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (U. P. Act I of 1957). We are unable to accept this argument. From a perusal of the relevant provisions before and after the amendment in the Central Act it would appear that the conditions imposed upon the employer, by the said section at both the stages were mandatory. Before it was amended the employer could not pass an order of dismissal during the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute without the express permission in writing of the Conciliation Officer, Board or the Tribunal as the case may be. The section as it then stood did not make any distinction between misconduct connected with the dispute and misconduct not connected with the dispute.

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After it was amended by Act XXXVI of 1956, sub-cl. (1) provided for those cases in which the misconduct for which the employee had been dismissed was connected with the dispute pending at the time when the order of dismissal was passed and sub-cl. (2) provided for a misconduct not connected with the dispute. Under sub-cl. (1) an order of dismissal could not be passed save with the express permission in writing of the authority before which the proceeding was pending and under the proviso to sub-cl. (2)(b) no such order of dismissal could be passed unless the employee had been paid wages for one month and an application had been made by the employer to the authority before which the proceeding was pending for approval of the action taken by the employer. The requirements of both these sub-cl. (1) and (2) are on

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the face of it mandatory and there seems to be no justification for holding that the law laid down by the Supreme Court in the cases referred to above will apply only to cases falling under sub-cl. (1) and not under sub-cl. (2) of s 33 of the Central Act.

An India Corporation v. V. A. Rebello (1) was a case where the services of V. A. Rebello had been terminated by the *Air India Corporation and V. A. Rebello* had filed a complaint under s. 33-A of the Central Act. The Tribunal found that the order of termination had been passed in violation of the provisions of s 33. Before the Supreme Court one of the questions for consideration was whether the order of termination amounted to dismissal and if it did amount to dismissal whether the requirements of s 33 had been fulfilled. Considering the scope of sub-ss (1) and (2) of s. 33 in that context their Lordships of the Supreme Court made the following observation:

"It is not necessary for us to decide whether the present case is governed by sub-s (1) or sub-s (2) because the relevant clause in both the sub-sections is couched in similar language and we do not find any difference in the essential scope and purpose of these two sub-sections as far as the controversy before us is concerned."

Learned counsel for the appellant then relied upon the case of *Senior Superintendent, R. M. S. v. K. V. Gopinath* (2) wherein their Lordships of the Supreme Court while interpreting the provisions of r. 5 of Central Services (Temporary Services) Rules, 1965 observed that the requirement about payment of one month's salary in the said rule was mandatory and its non-compliance would render the order of termination of a temporary Government servant invalid.

(1) A.I.R. 1972 S.C. 1343.

(2) (1972) 1 L.L.J. 486.

We are, however, of the opinion that the observations made in the said case will not apply to the facts of the instant case where we are concerned with the interpretation of s. 6-E (2) of the Act which is in *pari materia* with s. 33 of the Central Act. In our opinion the requirements of the relevant proviso are conditions precedent to the maintainability of a complaint under s. 6-F of the Act. Normally a dispute is to be referred to a Labour Court or Tribunal by the State Government under s. 4-K of the Act. S. 6-F gives a right even to the aggrieved workmen to make a complaint to a Labour Court or Industrial Tribunal if the provisions of s. 6-F have not been complied with and thereby achieve the same object which could be achieved on a reference made under s. 4-K of the Act. We are, therefore, of the opinion that non-compliance of the requirements of s. 6-E of the Act have the effect of only enabling the aggrieved workmen to make a complaint under s. 6-F of the Act and not of rendering the order of punishment invalid on this ground alone.

We, therefore, allow the appeals set aside the order of the learned single Judge and quash the award of the Industrial Tribunal dated 24th August, 1959. We further direct the Industrial Tribunal to decide the question whether the order of dismissal passed by the company against Paras Nath Misra is justified on the merits and thereafter to pass appropriate orders. The appellant in Special Appeal No. 377 of 1964 would be entitled to his costs but there will be no order as to costs in Special Appeal No. 498 of 1964.

Appeals allowed.

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CRIMINAL REVISION

*Before Mr. Justice K. C. Puri**

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STATE AND ANOTHER

... OPPOSITE-PARTIES.

U. P. Municipalities Act, 1916, s. 298, List I, Part A, cl. (h) (viii)—Word "Sanitation",—Meaning and scope of—Bye-law requiring to leave four feet open space between a building and a road—Power of Municipality to make.

Sanitation is a very wide word. It is not confined to the interior of the building. Sanitation contemplates the surroundings of the building as well. The provision of having an open space left by the side of the building in between the building and the lane or road may be necessary for the upkeep of the sanitation of the building concerned. As such, the power to frame a bye-law requiring to leave an open space as stated above, could be exercised by the Municipal Board under sub-cl. (viii) of cl. (h) of List I (Part A) referred to in sub-s. (2) of s. 298 of the Act. The bye-law could very well have been framed in exercise of the power contained in sub-s. (1) of s. 298 of the Act.

Criminal Revision No. 243 of 1969 against the order dated 31st July, 1969 passed by D. N. Khanna Assistant Sessions Judge, Faizabad, dismissing the Criminal Appeal No. 120 of 1969.

S. L. Verma, for the Appellant.

Jagdish Kumar, for the Opposite-parties.

K. C. PURI, J.:—This revision petition has been filed by Bashir Ahmad Khan against an order dated 31st July, 1969 passed by the Assistant Sessions Judge, Faizabad dismissing the appeal preferred by the petitioner against the judgment and order dated 16th September, 1968 passed by an Extra Magistrate, Faizabad convicting the petitioner under s. 185 of the U. P. Municipalities Act and sentencing him to a fine of Rs. 55 for the same.

On the report of the Sub-Overseer of the Nagar Palika, Faizabad, the petitioner was prosecuted for hav-

*While sitting at Lucknow.

ing constructed a house of *khaprail* in Sahebganj, Faizabad without leaving a *chabutra* of 4 feet and without obtaining a building certificate for effecting the said construction.

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The petitioner pleaded that no new construction had been made by him and as such he was not required to obtain any sanction for effecting the same. With regard to the petitioner not having left a *chabutra* of 4 feet the petitioner asserted that the very provision under which he was required to leave a *chabutra* of four feet was beyond the power of the municipality concerned and, therefore, even if the petitioner did not abide by the said provision, he did not commit any offence.

K. C. Puri,
J.

I have heard the learned counsel for the parties.

The first contention advanced by the learned counsel for the petitioner is that the prosecution has failed to establish that the house in question is situated within the "*wartman vikasit kshetra*" as defined in bye-law no. 1, cl. 46 of the bye-laws made under the Municipalities Act. The said bye-law reads as under :

" '*Wartman vikasit kshetra*' se arth us kshetra se hai jo municipal seema ke andar ho aur jiska ek bara bhag awas ewam vyapar ke liye vikasit ho chuka ho तथा सड़क, जल, सेवर और बिजली की समस्त सुविधाएँ उपलब्ध हो."

The learned Assistant Sessions Judge, who dismissed the appeal, assessed the evidence led by the prosecution thoroughly and on relying on the statements of the Sub-Overseer who had submitted report for the prosecution of the petitioner found that the construction in question is situated in a locality which comes within the purview of the said definition. I have no reason to disagree with the said finding of fact. It is urged by the learned counsel for the petitioner that the said definition contemplates that road, water, sewer and electricity, etc. should

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be available in the area in question and it is then and then alone that such an area would fall within the said definition. Stress is laid by the learned counsel for the petitioner on the non-existence of a sewer in the said locality. It is not disputed that roads, water and electricity, etc. are available in the locality in which the construction in question exists, but it is urged that sewer is wanting in that locality. No question has been put to the Sub-Overseer to elicit out of him as to whether sewer does or does not exist in the said locality. Even assuming that sewer is non-existent in the said locality so far but the other multiple amenities are available in the said locality, the area in question would be deemed to be duly developed and would come within the bye-law in question. The very word "adi" shows that the amenities which have been enumerated in the said bye-law are only illustrative and not exhaustive and if one of the enumerated amenities is non-existent presently and other multiple amenities are available there and residential buildings as well as commercial buildings are in existence in the area in question, then such an area would come within the ambit of "wartman vikasit kshetra". In these circumstances the said contention fails.

It is next contended by the learned counsel for the petitioner that the bye-law no. 16(Jha) of the bye-laws of the Municipal Board of Faizabad is beyond the power of the said Municipal Board and as such cannot be enforced. The said by-law reads as under :

"Wartman vikasit kshetra—upar di gayi talika kewal adhivikasit kshetron men lagu hogi. Wartman vikasit kshetron men bhawan yadi kisi bhi chaurai ke marg, sadak ya gali par sthit hai to uska kinaare yadi sampurna grabhag men kam se kam 4 feet chauri jagah khuli jagah khuli roop men chhori jayegi, yadi bhawan ka pravesha marg sadak ya awas

kshetra men vikasit park ya khuli jagah ke samne aur gali ke kinare ho to khule roop men chhori jane wali jagah 5 feet hogi aur is jagah par chahardiwari, chabutra ya bahar ki or khulne wale chhajje, jinki reling 3 feet hogi, se adhik na ho, ko chhorkar kisi prakar ka bhi nirman na hoga. Kintu sath hi yadi nirman ya punarnirman ke samaya makan ke samne wali wartman sadak ki chaurai 12 feet se kam hai to makan ko peeche hatakar banana hoga taki sadak 12 feet chauri ho jaye aur uske baad yatha apekshit aage ki or jagah chor di jaye."

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It is provided in the said bye-law that when a building is to be constructed on a road or a lane, then at least 4 feet wide open space shall be left between the building and the road. It is not disputed that an open space as contemplated by the said bye-law has not been left by the petitioner in between the building in question and the road. It is urged by the learned counsel for the petitioner that s. 298 of the U. P. Municipalities Act provides power for making bye-laws for any municipality and List I referred to in sub-s (2) of s. 298 contains the matters regard to which the municipality concerned is empowered to frame bye-laws. It is further pointed that in sub-cl. (viii) of cl. (h) of Part A of List I it is provided that "any other matter affecting the ventilation or sanitation of the building" and as such the municipality is empowered to make bye-laws in connection with the erection, re-erection or alteration of a building only with regard to a matter or matters which affect the ventilation or sanitation of the building and that the provision concerning the leaving of an open space in between the building and the road or lane is not a matter of the aforesaid nature. It is contended by the learned counsel for the petitioner that the word "sanitation" cannot be extended to mean that an open space as observed earlier is to be left because the open space would in no way improve the sanitation of

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the said building. Sanitation is a very wide word. It is not confined wholly to the interior of the building. Sanitation contemplates the surroundings of the building as well. Therefore, the provision of having an open space left by the side of the building in between the building and the lane or road may also be necessary for the upkeep of the sanitation of the building concerned. Thus the said sub-clause cannot be said to be beyond the power of the municipal board concerned. It may also be noted here that in sub-s. (1) of s. 298 it is laid down that "a board by special resolution. . . . shall make byelaws applicable to the whole or any part of the municipality consistent with this Act and with any rule for the purpose of promoting or maintaining the health, safety and convenience of the inhabitant of the municipality and for the furtherance of municipal administration under this Act." This sub-section gives general power for making bye-laws to a municipal board and herein wide powers have been given for making bye-laws for the purpose of promoting or maintaining the health, safety and convenience of the inhabitant. The word "inhabitant" does not exclude the inhabitants of the building in question. Bye-law 16(Jha) referred to above, could very well be framed in exercise of the power provided in sub-s. (1) of s. 298 as well. It is urged by the learned counsel for the petitioner that it is only under sub-s. (2) of s. 298 that the bye-law in question has been framed and, therefore, it would be wrong to hold that the said bye-law has been framed in exercise of the power provided in sub-s. (1) of s. 298 as well. In sub-s. (2) of the said section it is specifically provided that "without prejudice to the generality of the power conferred by sub-s. (1), the board of a municipality, wherever situated may in the exercise of the said power, make any bye-law described in List I . . . and the board of a municipality, wholly, or in part, situated in hilly tract may further make, in the exercise of the said power, any bye-law des-

cribed in List II. . .” So the power which is provided in sub-s. (2) is in addition to the power given to a municipal board for making bye-laws under sub-s. (1) of s. 298. As observed earlier, the power provided in sub-s. (1) is to be exercised by the board for promoting or maintaining the health, safety and convenience of the inhabitants of the municipality. Bye-law 16 (Jha) could very well have been framed in exercise of the power contained in sub-s. (1) as well, and yet it has been held above that even in exercise of the power contained in sub-s. (2) of s. 298 the said bye-law, i.e. 16 (Jha) could be framed as the word “sanitation” in sub-cl. (viii) of cl (h) referred above includes the leaving of an open space in between a building and a road, inasmuch as the sanitary conditions of the building would be benefited by the leaving of an open space in between the building and the road. Thus looking from either angle the bye-law 16 (Jha) has been made in the due exercise of the power vested in the board concerned.

Another contention advanced by the learned counsel for the petitioner is that no new construction had been made and consequently there was no necessity to obtain sanction of the municipal board for effecting the same. The courts below have concurred that the construction in question was a new construction. That being so, sanction of the board for effecting the same was required and since the petitioner has not obtained the same, though it is on the record that he had applied for it, consequently he was guilty of making the construction without obtaining requisite sanction. He has consequently been rightly penalised for, firstly, not leaving the requisite open space and, secondly, for not obtaining a building certificate for making the construction.

It may be mentioned here that the learned counsel for the petitioner, *inter alia*, urged that the Municipal

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Board, Faizabad itself passed a resolution that their counsel had given them the opinion that bye-law 16(Jha) was not within the power of the municipal board and, therefore, all the cases which were then pending might be compounded. The learned counsel for the opposite parties does not admit that the Board had anywhere held that the said bye-law was beyond the power of the municipal board and it is further urged by him that even if such a resolution had been passed the same would not take the said bye-law off the statute book and that the counsel for the petitioner has not pointed out that the Government at any time revoked the said bye-law. Since there is nothing before me to hold that the said bye-law has been taken off the Statute book, the said resolution, even if it be there, only laid down that the cases which were pending might be compounded and I am consequently not in a position to hold that the said bye-law has since been withdrawn. It is always open to the petitioner to approach the municipal board concerned to compound the offence.

Pursuant to the above discussion, the petition is dismissed. The stay order is vacated.

Criminal revision dismissed.

APPELLATE CIVIL

Before Mr. Justice S. Chandra and Mr. Justice N. D.
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KAMAL AHMAD AND ANOTHER ... APPELLANTS,

v.

DEPUTY DIRECTOR, CONSOLI-

DATION AND OTHERS ... RESPONDENTS.

U. P. Consolidation of Holdings Act, 1953,—S. 12 of the Act is not affected by r. 9 of O. XXII, C. P. C.

An objection under s. 12 of the U. P. Consolidation of Holdings Act not being a suit is not affected by O. XXII, r. 9, C. P. C. and an objection under s. 12 is consequently not barred.

U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 30-A—The word “retain” in Expl 1 to s. 230-A—Person evicted from the land after 30th June, 1948, has the right to restoration of possession.

The phrase “retain possession” obviously can apply only in situation where the person was in fact in possession; but if for some reason was not in possession, he was entitled to sue for restoration of possession under s. 232. In the context of the main section, the first explanation would carry some sense only if the word “retain” was read as “take” or “regain” and to read the claim for restoration of possession would be maintainable.

Special Appeal No. 21 of 1965 from the judgment and decree dated 8th December, 1964 of G. C. MATHUR, in Civil Miscellaneous Writ no. 1617 of 1959.

Sachida Nand Sahai, for the Appellants.

V. B. L. Srivastava, for the Respondents.

S. CHANDRA, J.:—The question was whether the respondents nos. 3 and 4 became *adhwasis* by virtue of

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their being recorded as occupants in the revenue papers of 1356 F. The Settlement Officer, Consolidated the question in favour of the respondents and upheld their claim. The finding was affirmed in revision. Aggrieved, the appellants instituted a writ petition in this court, which, however, failed. Hence, the present appeal.

Mr. *Sachchidanand Sahai*, learned counsel for the appellants, has raised the following submissions in support of the appeal :

(i) The objection under s. 12 of the U.P. Consolidation of Holdings Act was barred by O. XXII, r. 9, C. P. C.

(ii) The finding given in the earlier suit that the entry of 1356 F. was fictitious operated as *res judicata*.

(iii) The entry of 1356 F. must, in law, be deemed to have been corrected within meaning of Expls. 2 and 3 to s. 230-A of the U.P. Zamindari Abolition and Land Reforms Act.

(iv) In view of the first explanation to s. 230-A, the respondents had no right to restoration of possession, and so, their objection was not maintainable.

In order to appreciate these submissions, the material and relevant facts may be mentioned.

The appellants were the tenants of the plots in dispute and on 2nd June, 1950, instituted a suit for ejectment of the respondents under s. 180 of the U.P. Tenancy Act. The suit was decreed on 29th November, 1952, and the decree was affirmed in appeal. On 20th June, 1953, the appellants were restored to possession after ejectment of the respondents. The appellate decree was affirmed by the Board of Revenue.

Thereafter the respondents made an application under s. 232 of the Zamindari Abolition Act for restoration of possession on the ground that they had become *adhivasis*. This application, was, however, declared to have abated on 6th July, 1956. Subsequently, the respondents instituted a second application under s. 232. This was allowed. The appellants filed an appeal against that order. During the pendency of the appeal, proceedings under the Consolidation of Holdings Act commenced in the village with the result that the hearing of the appeal was stayed.

The respondents filed an objection under s. 12, Consolidation of Holdings Act, claiming *adhivasi* rights on the ground that they were recorded occupants in 1356 F.

O. XXII, r. 9, C. P. C. provides that where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action. This provision bars a second suit on the same cause of action. Firstly, the claim or objection under the Consolidation of Holdings Act is not a suit within meaning of O. XXII, r. 9, C. P. C. In the second place, r. 9 does not, expressly or by an implication, destroy or extinguish the cause of action itself. It only bars the remedy of a suit on the same cause of action. We are not inclined to read r. 9 as having the effect of extinguishing the cause of action. S. 28 of the Limitation Act, 1908, specifically provides for the extinguishment of the cause of action, when a suit for possession becomes barred by time. There is no similar provision in r. 9. In our opinion, the abatement did not destroy the cause of action and it could be availed of, if the law provided some remedy other than a suit to the respondents to ventilate their rights. An objection under s. 12 was, not a suit. See *Bombay Dyeing and Manufacturing Co. v. State of Bombay* (1). We find no merits in this submission.

(1) A I R. 1958 S.C. 828, para 14.

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In the alternative, Mr. *Sahai* urged that the second suit under s. 232 filed on 31st August, 1957 was not competent, because it was barred by O. XXII, r. 9, C.P.C. S. 232 of the Zamindari Abolition Act prescribes a period of limitation of 30 months from the appointed date, which for the land in dispute was 1st April, 1955. A suit for possession under s. 232 became barred by time on 1st October, 1957. Thereafter, in view of s. 28, Limitation Act, the right of the respondents extinguished. The point has no substance. Mr. *Sahai* informed us that the notification under s. 4 of the Consolidation of Holdings Act was published on 18th November, 1955. It is settled that after the publication of such a notification, no suit or application could be entertained by any civil or revenue court regarding the determination of rights which could be done under the Consolidation of Holdings Act, vide s. 49 thereof. The notification issued in November 1955 was well within thirty months of the appointed day namely, 1st April, 1955. The respondents rights did not extinguish. The objection under s. 12 was maintainable.

The second submission is equally without merit. There was no finding in the suit filed under s. 180 of the Tenancy Act that the entry of 1356 F. was fictitious. The courts made an observation that the entry of 1356 F. had not been filed. There is nothing in those judgments to indicate that the 1356 F. entry was held fictitious.

It was then urged that the decree for ejectment under s. 180 should be deemed to require correction of the entry of 1356 F. within meaning of Expl. 3 to s. 230-A of the Zamindari Abolition Act. Under this explanation the entry should be deemed to have been corrected before the date of vesting, if an order or decree of a competent court requiring correction had been made before the said date and had become final. In the pre-

sent case, the ejectment suit was filed on 2nd June, 1950, long after the expiry of the year of 1356 F. The suit was decreed for ejectment. Obviously, the plaintiff's complaint was that the respondents were in unauthorised occupation of the plots. There is nothing in the judgment or decree requiring the correction of the entry of 1356 F. The decree only granted a relief of possession to the appellants. The appellants obtained possession on 20th June, 1953 by the dispossession of the respondents. A decree for ejectment passed in suit, filed after the expiry of 1356 F. is not a decree requiring correction of the entry of 1356 F. within meaning of the third explanation.

Learned counsel for the appellants placed reliance on a Full Bench decision of this Court in *Ambika Prasad v. Kamla Prasad* (1). The case is distinguishable on facts. In that case, a compromise decree stating that possession had been transferred was passed prior to 1356 F. Such a decree was held within the purview of the third explanation. Here the proceedings for ejectment were instituted after 1356 F. had gone by. The respondents admittedly remained in possession throughout 1356 F.

The next point urged was that the Zauindari Abolition Act was by a notification dated 31st March, 1955, applied to the land in dispute (which was a Government estate) with effect from 1st April, 1955. The notification applied the Act with certain modifications. S. 230-A was added to the Act in substitution for s. 20. Under its cl. (b) the person who was recorded as an occupant in 1356 F. was entitled to take or retain possession as an *adhrvasi*. The first explanation to s. 230-A states:

"Where a person referred to in cl. (b) was evicted from the land after 30th June, 1948, he shall, notwithstanding anything in any order or decree, be deemed to be a person entitled to retain possession of the land."

(1) A.I.R. 1971 All. 549.

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Learned counsel urged that in view of this explanation, the respondents having been evicted from the land after 30th June, 1948, were only entitled to retain possession. They were not entitled to sue for restoration of possession. Hence, their claim for possession was maintainable.

In our opinion, the word 'retain' in the explanation makes nonsense of the explanation. The explanation provides for a case where the person who was recorded as an occupant in 1956F. had been evicted from the land after 30th June, 1948, under some order or decree. Such an evicted person could not be deemed entitled to retain possession of the land, because he is, in fact, not in possession. The principal section entitles such a person either to take or retain possession. The phrase 'retain possession' obviously can apply only in a situation where the person was in fact in possession; but if he, for some reason, was not in possession he was entitled to "take" it, that is to say, to sue for restoration of possession under s. 232. In the context of the main section, the first explanation would carry some sense only if the word 'retain' was read as 'take' or 'regain'.

S. 20 of the original Zamindari Abolition Act also had a similar explanation. There the word used was 'regain' and not 'retain'. The Zamindari Abolition Act was extended to the various areas in this State by several notifications. We have seen the various notifications. In each of them, the word at the relevant place in the first explanation is 'regain'.

It is obvious that the legislative intent in drafting the first explanation was to confer an entitlement upon the recorded occupant to regain possession of the land, notwithstanding anything in any order or decree, if he was evicted after 30th June, 1948. The legislative history as well as the object of the first explanation leads to the inference that the intended word was 'regain', and not

'retain' in the first explanation. The mention of letter 't' in place of 'g' is obviously either the draftsman's or the printer's clerical error.

The question then arises whether under such circumstances, the court has power to construe the language so as to fulfil its plain object.

Maxwell on the Interpretation of Statutes, 12th Edition, p. 231, says that sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act. In *Eton College v. Minister of Agriculture, Fisheries and Food* (1) WILBERFORCE, J., held that the word 'or' occurring in the Ecclesiastical Leases Act, 1751 was a mistake for 'of' and proceeded to apply the Act on that assumption. Similarly in *Clapham v. National Assistance Board* (2) LORD PARKER, C.J., construed s. 44(3) of the National Assistance Act, 1948, as if the word 'on' occurring in the phrase "in any proceedings on an application under the last foregoing sub-section" should be read as 'arising out of'.

In *Seaford Court Estates Ltd. v. Asher* (3) DENNING, L. J. said:

"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament . . . and then he must supplement the written word so as to give "force and life" to the intention of the Legislature. . . A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

(1) 1961 Ch 274.

(2) (1961) 2 Q.B. 77

(3) (1919) 2 All. F.R. 155 at 164.

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This passage was quoted with approval by the Supreme Court in *M. Pentiah v. Muddala Veeramallappa* (1). In that case, the Hyderabad District Municipalities Act, 1956 did not on its term apply to the first election that may be held after the coming into force of that Act. There was no other provision for holding the first election. This position led to the complete failure of the object of the Act. The Supreme Court read s. 20 of that Act as if a proviso that every general election excepting the first election shall be held, was added to the section. Such an addition was held to carry out the intention of the Legislature and do the least violence to the language used. So read, the Act would provide power to hold the first general election. In the light of this principle, it appears to us that life and force can be given to the first explanation, and the plain intention of the Legislature could be fulfilled only if the word 'retain' is construed as 'regain'. The claim of the respondents was maintainable.

The various points urged in support of the appeal having failed, the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice K B. Asthanu

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APPELLANT

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Code of Civil Procedure, 1908, O. XXI, r. 63 Degree passed in suit under O. 21, r. 63—Objection of the judgment-debtor disallowed by the Executing Court and sale held—Decree in the suit does not result in automatic cancellation of the sale in favour of the auction purchaser

(1) A.I.R. 1961 S.C. 1107, para. 27

A sale held in execution of a decree cannot be set aside unless the executing court allows any objection grounded on the provisions of O. 21, r. 89 or 90 or 91 and the sale in execution proceedings is not destroyed by the decree in a suit under O. 21, r. 63. Leaving aside the cases where the sale is held without giving notice to the judgment debtor or where the court is misled in fixing the price or when there was no decree in existence at the time when the sale was held, an execution sale can only be set aside when an application under r. 89 or 90 or 91 of O. 21 has been successfully made. This principle will apply even to a case where the property sold in auction does not belong to the judgment debtor. There is no inherent power vested in the court to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold. There being a specific provision for it in the Code under r. 91 a sale could be set aside on such a ground only at the instance of the auction purchaser.

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— — —, O. XXI, r. 58(2) and 92 as amended by Allahabad High Court—Whether result in changing the law.

These amendments make explicit what was hitherto implicit. By the addition in sub-r. (2) of r. 58 there has been a further elaboration of the power of the executing court. Where a claim or objection is disallowed and the aggrieved party files a suit under r. 63 which is ultimately dismissed, there will be no difficulty in confirming a sale held during the pendency of the investigation of the claim or objection under r. 58. Where the suit of the aggrieved party under r. 63 is decreed then the conclusiveness attached to the decision under r. 58 will be destroyed and if the auction purchaser was bound by the decree in the suit he cannot resist the successful claimant to take possession of the property sold.

Execution Second Appeal No. 1231 of 1971 from the judgment and decree dated 27th April, 1972 passed by Inder Paul Singh, Additional District Judge, Bareilly.

R. R. Agarwal, for the Appellant.

Ashoke Gupta, for the Respondent.

ASTHANA, J :—This second appeal purporting to be under s. 47 of the Civil Procedure Code is by Ramesh Kumar who had filed an objection under r. 58 of O. XXI, Civil Procedure Code questioning the attachment of a house in execution of a simple money decree in favour of Narendra Deo against Jai Jai Ram.

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The objection under r. 58 of O. XXI was that the objector and not the judgment-debtor was the owner of the house attached. This objection was preferred on September 21, 1968. The executing court, however, did not stay the execution sale which had been already advertised to be held on September 23, 1968. The sale was held on the day fixed, that is on September 23, 1968, and the highest bid was that of Budhram Sharma which was accepted by the court on September 25, 1968. The objection of Ramesh Kumar under r. 58 of O. XXI was disallowed by the executing court on April 14, 1970. Before the sale could be confirmed by the court Ramesh Kumar filed a suit under O. XXI, r. 63 for declaration of his title in the house sold. To this suit only the judgment-debtor and the decree-holder were impleaded as defendants. The auction purchaser Budhram Sharma was not made a party. On opposition of Ramesh Kumar the attempt by Budhram Sharma, the auction purchaser, to be impleaded as defendant failed. There was a compromise between the parties and the suit was decided in terms of the compromise on October 20, 1970 by which the title of Ramesh Kumar to the house sold in execution of the decree was recognised. It appears while the said suit was pending the judgment-debtor paid the decretal amount to the decree-holder and that payment was duly certified by the executing court by an order dated August 8, 1970 but as the sale had not been confirmed by the court by that time it was further ordered that the certification would not prejudice the rights of the auction purchaser, if any, acquired under law. Thereafter by an order dated December 21, 1970 the executing court struck off the execution in full satisfaction and set aside the sale dated September 23, 1968. Budhram Sharma, the auction purchaser, filed an appeal against the said order which was allowed and the sale in his favour was confirmed by the lower appellate court.

by its order dated April 27, 1971. It is against this order that Ramesh Kumar the objector-claimant has come up in appeal.

The main question which falls for determination in this appeal is whether the decree passed in favour of the appellant Ramesh Kumar in the suit filed under r. 63 of O. XXI will result in an automatic cancellation of the sale in execution of the decree and for that reason the sale in favour of Budhram Sharma, the auction purchaser, was liable to be set aside. The two courts below have differed on this question. The executing court held that the objector Ramesh Kumar having established his title to the house attached in execution in the suit under r. 63 of O. XXI the sale held in execution automatically failed and was liable to be set aside. The lower appellate court held that there being no objection under rr. 89, 91 of O. XXI to set aside the execution sale, no choice was left with the court but to confirm the sale inasmuch as Budhram Sharma, the auction purchaser, not being a party to the suit under O. XXI, r. 63; the order of the executing court disallowing the objection under r. 58 of O. XXI remained conclusive in his favour and the sale was liable to be confirmed.

Rajaram Agarwal, learned counsel appearing for the appellant, relying upon the provisions of the relevant rules of O. XXI as amended by our High Court submitted that the objection of the appellant under r. 58 of O. XXI would stand allowed, the appellant having succeeded in the suit under r. 63 of O. XXI, and the very basis, that is the attachment of the house which led to the sale in execution, having disappeared, no further question arose of the confirmation of the sale. Reliance was placed by the learned counsel on the decision of a learned single Judge of the Madhya Bharat High Court in the case of *Kesho Narain v Ghosi Ram* (1).

(1) A.I.R. 1956 M.B. 226.

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Learned counsel assailed the view taken by the learned Judge of the court below that the auction purchaser is a necessary party in a suit under r. 63 of O. XXI and if he was not impleaded in such a suit the decree passed in the suit would not be binding on him and he was entitled to have the sale confirmed in his favour, there being no objection under rr. 89—91 of O. XXI, as legally erroneous. Relying upon a decision of the Patna High Court in *Kali Dayal v. Umesh Prasad* (1) the learned counsel urged that the auction purchaser is the representative of judgment-debtor and will be bound by previous litigation between judgment-debtor and a third person, hence the auction purchaser would be bound by the decree in the suit filed by Ramesh Kumar under r. 63 of O. XXI wherein it was declared that Ramesh Kumar was the owner of the attached house and not the judgment-debtor Jai Jai Ram. It was further urged that the consequence of the decree in that suit was that the objection of Ramesh Kumar under O. XXI, r. 58 stood allowed and the house stood released from attachment, the subsequent sale held in execution, therefore fell through. In support of the proposition that an auction purchaser at a sale held in execution of a simple money decree is a representative of the judgment-debtor the learned counsel cited *Gulzari Lal v. Madhoram* (2), *M. Ghimpiramma v. Pabbi-setti Subramanyam* (3) and *Mst. Suraj Dei v. Gulab Dei* (4). On the strength of a decision of Division Bench of this Court in the case of *Ghasi Ram v. Mangal Chand* (5) the learned counsel submitted that to a suit by a claimant to establish that the property attached belonged to him only the decree-holder would be a necessary party.

Sri *Ashok Gupta*, learned counsel appearing for the respondent Budhiram Sharma, auction purchaser, sub-

(1) A.I.R. 1922 Patna 68.

(2) I.L.R. XXVI All 447 (F.B.).

(3) A.I.R. 1957, A.P. 61 (F.B.).

(4) A.I.R. 1955 All. 49 (F.B.).

(5) I.L.R. XXVIII All. 41.

mitted that a sale once held in execution of a decree must be confirmed unless on an inquiry by the executing court any objection grounded on rr. 89 or 90 or 91 of O. XXI, Civil Procedure Code is allowed. Reliance was placed on a decision of the Supreme Court in the case of *Janakraj v. Gurdial Singh* (1). He further urged that the objection of Ramesh Kumar under O. XXI, r. 58, C.P.C. having been disallowed and the attached house having been found in possession of the judgment-debtor there could be no impediment in the sale being held on the date advertised and thereafter confirmed as required by the law. It was submitted that the order of the executing court disallowing the objection of Ramesh Kumar under O. XXI, r. 58 of the Civil Procedure Code was conclusive in favour of the auction purchaser and he not having been impleaded as defendant in the suit under r. 63 of O. XXI as a necessary party, would not be bound by the decree in that suit. *Sri Gupta* refuted the contention of the appellant that the auction purchaser being a representative of the judgment-debtor will be bound by the decree in the said suit. *Sri Gupta* did not controvert the law laid down by the Full Benches of the different High Courts cited by the learned counsel for the appellant, and conceded that for certain purposes depending on the facts and circumstances of each case an auction purchaser would be a representative of the judgment-debtor as the right and interest of the judgment-debtor in the property purchased by him at an auction sale will vest in him but submitted that this rule of law cannot be said to be of universal application to all circumstances and would not be attracted to the facts of the instant case where the rejection of the claim of Ramesh Kumar under r. 58 of O. XXI was on account of a finding that Jai Jai Ram judgment-debtor, who is father of Ramesh Kumar, the objector-claimant, collud-

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ed with his son and the decree in the suit subsequently filed by Ramesh Kumar under r. 63 of O. XXI not being on merits but passed on a compromise between the father and son, the decree-holder having consented to the compromise as he had no interest left having been paid the amount of the decree. It was pointed out that Ramesh Kumar opposed the application of the auction purchaser to be impleaded as a defendant in the suit and the main ground on which the court rejected the application of the auction purchaser was that the parties to the suit had compromised which compromise only remained to be verified and at that stage impleading of any third party would unreasonably and unnecessarily delay the decision of the suit. In this connection it was further urged that the rights of a third party, that is the auction purchaser, having become involved any compromise or adjustment between the decree-holder, the judgment-debtor and the objector-claimant ought not have been sanctioned by the court, and the sale could not be set aside on the basis of a compromise decree as it would affect the auction purchaser's interest. Reliance was placed on a decision of the privy council in the case of *Nanhey Lal v. Umrao Singh* (1). Sri Gupta also contended that the objector-claimant Ramesh Kumar and the judgment-debtor Jai Jai Ram, being son and father, there was every likelihood of collusion between them to save the property and it appears that they satisfied the decree by payment outside the court and then obtained a compromise decree in the suit under r. 63 of O. XXI and in such circumstances the rule that an auction purchaser is representative of a judgment-debtor will not apply. The observations made by ALLSOP, J. in the case of *Mohammad Uma v. Abdul Ghani* (2) to the effect that there are many cases where the judgment-debtors have very little pro-

(1) A.I.R. 1931 P.C. 38.

(2) A.I.R. 1939 All. 728

party against which the decree-holders can proceed and are interested merely to save the properties attached, because, if those are saved, there is no other method by which the decree-holders can proceed against them and in such cases there may be collusion between them and the claimants.

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Before I examine the niceties of the questions arising from the able arguments of the learned counsel for the respective parties, I think it necessary to notice some of the salient features in the case which may be helpful in resolving the controversy in this appeal.

From the record it appears that an order for attachment of the house in dispute was passed by the executing court on October 17, 1967 and the attachment actually was effected within a few days of the said order. Then on August 7, 1968, ten months later, the terms of the proclamation for sale were settled and the sale was advertised for September 23, 1968. It was on September 21, 1968 almost about 11 months after the attachment and more than a month after the sale proclamation that the objection under O. XXI, r. 58, Civil Procedure Code was filed by Ramesh Kumar, the son of the judgment-debtor Jai Jai Ram. There is no satisfactory explanation on record why the objection was so much delayed. Under r. 58 of O. XXI a court may refuse to make investigation where it considers the claim or objection as designedly or unnecessarily delayed. However, the executing court decided to investigate the claim raised in the objection but did not think it fit to stay the sale though a prayer to that effect was made by the claimant-objector. The sale was allowed to be held on August 23, 1968, the date advertised. The order of the executing court dated April 14, 1970 disallowing the objection under r. 58 shows that on the evidence the court was not even *prima facie* satisfied about the genuineness

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R. 58, 11
K. 58, 11
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of the claim and observed that the delayed claim appeared to be collusive. It is not clear from the record whether a notice was sent to the auction purchaser Budhram Sharma, who by that time had come upon the scene. On May 8, 1970 the suit under r. 63 of O XXI was filed by Ramesh Kumar without impleading Budhram Sharma, the auction purchaser. Then on August 8, 1970 an application was filed before the executing court for certifying the payment of the decretal amount to the decree-holder outside the court and the executing court passed an order certifying the payment but without prejudice to the rights of the auction purchaser, if any, acquired under law. Then an application was made in the suit by all the parties, that is the objector-claimant, who was the plaintiff, the judgment-debtor and the decree-holder, who were the two defendants, for recording a compromise in the suit. It was at that stage that Budhram auction purchaser applied to be impleaded as a defendant to the suit. On the opposition of Ramesh Kumar, the plaintiff, the application of auction purchaser was rejected mainly on the ground that the suit was about to be compromised and a third party's intervention at that stage was not proper. On October 20, 1970 the suit was decreed in terms of the compromise. One of the terms was that Ramesh Kumar the plaintiff, would continue to be the owner of the house attached in execution of the decree. On April 28, 1971 the sale was confirmed.

Considering the relationship between the objector-claimant and the judgment-debtor, the great delay in preferring the objection under r. 58 of O XXI and the manner in which the suit under r. 63 was compromised go a long way in support of the submission of Sri Gupta that there was always an apprehension of collusion and may be actually there was collusion as appeared to the executing court while disallowing the objec-

tion under r. 58, though there may not be any positive evidence to that effect, therefore, the rule that the interest of the auction purchaser was represented by the judgment-debtor in the suit filed under r. 63 of O. XXI ought not to be extended to the facts and circumstances of the instant case. As far as the decree-holder was concerned, he had been paid off outside the court. He thus had no interest in realisation of his decretal amount from the sale proceeds deposited in court, he having got his money that was due to him. It would remain no longer his worry to see that the execution sale is confirmed. In such circumstances he could agree to any arrangement arrived at between the father and son about the attached house. The judgment-debtor having paid the decretal amount outside the court would naturally become interested in getting the auctioned house back to the family and the only best and most convenient way was to concede to the claim of his son. In a way the judgment-debtor's own interest impelled him to be adverse to the interest of the auction purchaser. Here the judgment-debtor was interested always not to oppose the claim of the objector. The whole climate was, therefore, one which was ripe for collusion. In the particular circumstances of the case, I think it was the duty of Ramesh Kumar to implead Budh Ram Sharma, the auction purchaser, as defendant to the suit filed under r. 63. When Budhram Sharma on his own initiative came before the court, the plaintiff Ramesh Kumar instead of welcoming the move, opposed it. He cannot now be heard to say that as an auction purchaser Budhram Sharma would be bound by the compromise decree in the suit when the title in his favour is not founded on any finding arrived at after a genuine and *bona fide* contest.

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In my judgment the compromise in the suit filed under r. 63, on which the title of Ramesh Kumar is founded, would not stand on a better footing than such a compromise arrived at without notice to the auction purchaser before the executing court during the investigation of the objection under r. 58. R. 63 itself provides that subject to the result of the suit the order made under r. 58 shall be conclusive. It is well settled that a decree in a suit would bind only the parties to that suit. Having held above that in so far as the suit of Ramesh Kumar under r. 63 was concerned, in the facts and circumstances of this case, the judgment-debtor could not represent the interest of the auction purchaser, anything decided in the suit would not affect the rights of the auction purchaser. Therefore, so far as the auction purchaser's interest goes, the original order under r. 58 disallowing the claim of Ramesh Kumar will remain conclusive. Any adjustment or arrangement by compromise after the execution sale had taken place without the auction purchaser being made a party to the suit and arrived at behind his back ought not to bind him. An executing court as held in *Nanhey Lal v. Umrao Singh* (1) ought not grant recognition to any adjustment come to out of court when a sale had been affected and third party's interest intervene. In that view of the law, it appears to me that the certification of the payment outside the court on August 8, 1970 ought not to have been made by the executing court as the sale had already been held two years earlier and the interest of Budhram Sharma, the auction purchaser, had intervened. However, that is not a question which should detain me longer in this appeal.

Reverting to the main argument of the learned council, appearing for the appellant, that the sub-stratum of the foundation on which the sale in execution

(1) A.I.R. 1931 P.C. 33.

proceedings stands, having been destroyed by the decree in the suit under r. 63 of O. XXI, the sale *ipso facto* fell through, I find great difficulty in accepting it. No doubt, the decision in the case of *Kesho Narain v. Ghasi Ram* (1) fully supports the contention of the appellant, but the decision therein to my mind, would no longer be valid in view of the decision of the Supreme Court in the case of *Janakraj v. Gurdial Singh* (2). As I read the judgment of the Supreme Court in the said case and as I appreciate the declaration of law made therein, I find that a sale held in execution of a decree cannot be set aside unless the executing court allows any objection grounded on the provisions of either rr. 89 or 90 or 91. The Supreme Court in para. 6 of the reported judgment pointed out certain exceptions as for instance where sale is held without giving notice to the judgment-debtor or where the court is misled in fixing the price or when there was no decree in existence at the time when the sale was held. Leaving aside such cases or their like an execution sale can only be set aside when an application under rr. 89 or 90 or 91 of O. XXI has been successfully made. It was strenuously urged by Sri *Agarwal* for the appellant that the rule of law laid down by the Supreme Court in the case of *Janakraj* (2) will have no application where the properties auctioned have been found not to belong to the judgment-debtor and in any case that rule will not apply in Uttar Pradesh in view of the amendment made by the High Court in the relevant rules of O. XXI. As to the first point of distinction urged by the learned counsel I think the rule laid down by the Supreme Court will be attracted even to a case where the property sold in auction does not belong to the judgment-debtor. R. 91 of O. XXI furnishes sufficient answer to this argument. It lays down that a purcha-

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(1) A.I.R. 1956 M.B. 226

(2) A.I.R. 1967 S.C. 608

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ser at any such sale in execution of a decree may apply to the court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. There is thus a specific rule for setting aside of a sale at the instance of a purchaser who finds that the judgment-debtor had no saleable interest in the property sold. In the present case it was open to Budhram Sharma to apply under r. 91 if he found that the decree obtained by Ramesh Kumar in the suit under r. 63 prejudicially affected his rights but Budhram Sharma did not do so. Then how could the sale be set aside. There is no inherent power vested with the court to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold there being a specified provision for it in the Code under r. 91 and a sale could be set aside on such a ground only at the instance of the auction purchaser. I think the court below rightly applied the *ratio* of the decision of the Supreme Court in the case of *Janakraj v Gurdial Singh* (1).

I do not think the amendments made locally to rr. 92 and 58(2) of O. XXI have changed the law materially. Those amendments make explicit what was hitherto implicit. By the addition in sub-r. (2) of r. 58 there had been a further elaboration of the power of the executing court. Those amendments do not in any way make the law declared by the Supreme Court in *Janak Raj's* case (1) inapplicable in Uttar Pradesh.

Much emphasis was laid by Sri *Agarwala* on the addition made to sub-r. (2) of r. 58 which is to the effect that "in no case shall a sale become absolute until the claim or objection has been decided". The learned counsel contended that an objection stands decided only when finally the suit under r. 63 is decided as the deci-

(1) A.I.R., 1967 S.C. 606.

sion of the executing court under r. 58 is always subject to the result of such suit. The submission was that by law as it stands in Uttar Pradesh a sale will never stand confirmed if the decision in a suit under r. 63 results in allowing the objection under r. 58 as the conclusiveness of the decision of the executing court under r. 58 will stand destroyed. Sri *Ashok Gupta* for the auction purchaser-respondent contended that the amendment of sub- r. (2) of r. 58 prohibits the confirmation of a sale and prevents it becoming absolute until the claim or objection has been decided under r. 58, that is to say that when a claim or objection has been filed under r. 58 pending the investigation of which the sale is held, then as soon as the executing court decides that claim or objection after investigation there remains no embargo on the power of the court to confirm the sale and make it absolute. The court is not to wait till the decision in the suit brought under r. 63 by the claimant or objector. I am inclined to agree with this construction and interpretation. Where a claim or objection is disallowed and the aggrieved party files a suit under r. 63 which is ultimately dismissed, there will be no difficulty in confirming a sale held during the pendency of the investigation of the claim or objection under r. 58. Where the suit of the aggrieved party under r. 63 is decreed then the conclusiveness attached to the decision under r. 58 will be destroyed and if the auction purchaser was bound by the decree in the suit he cannot resist the successful claimant to take possession of the property sold then the auction purchaser would be entitled to receive back the money deposited in court by him or if withdrawn realise it from the judgment-debtor or decree-holder or from both as the case may be. But here in the instant case the auction purchaser was a necessary party to the suit filed by the objector-claimant under r. 63 and he having not been made

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a party for which the objector-claimant himself is to be blamed the decision of the executing court under r. 58 remains conclusive and the sale in his favour has rightly been confirmed and made absolute.

As a result of the discussion above, this appeal fails and is dismissed with costs.

Appeal dismissed

APPELLATE CIVIL

Before Mr Justice S. D Khare and Mr. Justice

*K B. Srivastava**

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Constitution of India, Art 14—Reasonable classification—Test for.

Art. 14 of the Constitution forbids class legislation. It does not forbid reasonable classification. To pass the test of permissible classification, two conditions must be fulfilled, namely; (1) that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from those left out of the group and (2) that differentia must have a rational relation to the objects sought to be achieved.

U P Consolidation of Holdings Act 1958, ss 4, 5, 6, 7, 8, 9 (2), 9-A and 49—*Constitutionality of—Powers of the State Government under ss. 4 and 6 to place some villages under consolidation while excluding others, if, arbitrary—Different procedure for correction of Revenue records—Different set of courts and different right of appeal and revision prescribed under, if, discriminatory—Provisions, not hit by Art 14 of the Constitution.*

—ss. 9(1)(a) and 9(2)—*Word "Person" includes "Gaon-sabha" and "State Government".*

**While sitting at Lucknow.*

The Gaon Sabha is covered by the word "person" occurring in ss. 9(1)(a) and 9(2) of the Act. The word "person" is also wide enough to include the State Government unless such inclusion would be repugnant to the context in which the word is used in the sections.

Indian Registration Act, 1908, ss. 17(1)(b) and 49—*Unregistered document—Admissibility of—Suit for partition—Decree in terms of compromise passed in—Compromise defining shares of parties also in respect of some other property not subject-matter of the suit—Registration—Necessity of—Held, Compromise could be relied on as an admission of antecedent title.*

Where the compromise was entered into in a partition suit by which the parties took separate shares in the disputed Khata. The compromise also embodied a recital defining the shares of the parties in respect of property not subject-matter of the partition suit. In a subsequent litigation between the parties regarding the shares of parties in the property contained in the recital, question arose as to whether the compromise was inadmissible in evidence as proof of title in view of s. 17(1)(b), read with s. 49 of the Indian Registration Act.

Held, the parties recognized the existing title of each other and defined their shares by the compromise. A recognition of title or definition of a share on the basis of that recognition cannot be treated as creating, declaring, assigning, limiting or extinguishing any right, title or interest in immovable property, such a recognition may be oral or by a document, and if in document, it would not require registration. Even an unregistered document can be relied upon in proof of admission of title. The compromise can be relied upon as an admission of antecedent title.

Datto v. Baba Saheb (1), Ram Dular v. Raj Karan Pandey (2), Ram Gati Chaubey v. Ram Adhar Chaubey (3), Chandra Bhan Datt Ram Pandey v. Jagdish Datt Ram Pandey (4) distinguished.

Hiran Bibi v. Sohan Bibi (5), Devi Dayal v. Wazir Chand (6), Sailesh Chandra v. Bireswar Chatterji (7), Rani Hemanta Kumari v. Midnapur Zamindari Co. (8), Ram Gopal v. Tulsi Ram (9), Bakhtawar v. Sunder Lal (10) relied on.

Special Appeal no. 137 of 1969 against the judgment dated July 7, 1969 passed by G. S. LAL, J. in Writ Petition no. 633 of 1965.

(1) A.I.R. 1934 Bom. 194.

(3) 1961 A.L.J. 440 (F.B.).

(5) A.I.R. 1914 P.C. 44.

(7) A.I.R. 1930 Cal. 559.

(9) A.I.R. 1928 Acl. 641 F.B.

(2) 1960 A.W.R. 113.

(4) 1962 A.L.J. 404.

(6) 61 I.C. 328.

(8) A.I.R. 1919 P.C. 79.

(10) A.I.R. 1926 All. 173.

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	<i>K. B. SRIVASTAVA, J.</i> :—This special appeal arises out of consolidation proceedings.

One Bhikkam had two sons, Ram Ratan (father of the five appellants Shyam Sunder, Ram Shankar, Raja Ram, Sheo Ram and Sheo Govind) and Sia Ram, respondent no. 1. The name of Ram Ratan stood recorded in respect of *Khatas* nos. 329 and 330, situate in village Bharwara, in the district of Lucknow. On his death, the names of his five sons came to be recorded. When this village came under consolidation operations, Sia Ram filed an objection under s. 9(2), U. P. Consolidation of Holdings Act (hereinafter referred to as the Act) claiming co-tenancy rights to the extent of one-half in these two *Khatas* on the ground that the name of Ram Ratan came to be recorded originally because he was the elder brother and though his own name was not recorded, he still had his co-tenancy rights intact because of his cultivatory possession. His objection was dismissed by the Consolidation Officer and his appeal against that was also dismissed by the Settlement Officer, Consolidation. He then preferred a revision which was allowed by the Deputy Director, Consolidation and it was ordered that his name should also be recorded along with the names of the five appellants, as a co-tenant in the two *Khatas*. The appellants then filed writ Petition no. 633 of 1965 which was dismissed by a learned single Judge of this Court, giving rise to this special appeal.

The learned counsel for the appellants has challenged the constitutionality of the Act on various grounds, of which the following have been urged before us:

(1) Ss. 4 and 6 of the Act give arbitrary powers to the State Government to accord discriminatory treatment to tenure-holders in different villages by placing some villages under consolidation while excluding others, thus offending Art. 14 of the Constitution.

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(2) Ss. 5, 7 and 8 of the Act provide a procedure for the correction and revision of Revenue records for villages under consolidation; which is vitally different from that applicable to villages not under consolidation, and there is thus discrimination which offends Art. 14 of the Constitution.

(3) Ss. 5, 9, 9-A and 49 of the Act confer arbitrary powers on the consolidation authorities under which they can deprive a tenure-holder of his land or rights therein and the tenure-holder has been deprived of the protection of Courts available to other tenure-holders in village not under consolidation, thus creating discrimination which offends Art. 14 of the Constitution.

We will now deal with these matters. The Act was passed, as the preamble says, to provide for the consolidation of agricultural holdings for the development of agriculture. The object has also been succinctly stated in the Statement of Objects and Reasons. A clear picture of the back-ground history leading to the enactment of the statute in question also emerges from the discussion by their Lordships of the Supreme Court in *Attar Singh v. The State of Uttar Pradesh* (1).

Under s. 4(1), the State Government may, where it is of opinion that a district or part thereof may be brought under consolidation operations, make a declaration to that effect in the Gazette, whereupon it shall become lawful for any officer or authority empowered

(1) A I R. 1959 S.C. 564.

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by the District Deputy Director of Consolidation to enter upon and survey, in connection with rectangulation or otherwise, and to take levels of any land in such area; to fix pillars in connection with rectangulation; and to do all acts necessary to ascertain the suitability of the areas for consolidation operations. Under s. 4(2) of the Act where the State Government decides to start consolidation operations, either in an area covered by a declaration issued under sub-s. (1) or in any other area, it may issue a notification to this effect. S. 5 of the Act provides for the effect and consequences of a notification issued under s. 4(2). These consequences remain in force till the notification is cancelled under s. 6 or the consolidation operations are closed finally by a notification under s. 52. The consequences are that in an area under consolidation operations, the duty of maintaining the record-of-rights and preparing the Village map, the Field Book and the Annual Register of each village shall be performed by the District Deputy Director of Consolidation. Again, so long as the area remains under consolidation operations, no tenure-holder, except with the permission in writing of the Settlement Officer, Consolidation, previously obtained, shall either use his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming, or transfer by way of sale, gift or exchange any part of his holding. Finally, every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the Act, pending before any Court or authority, whether of the first instance or of appeal, reference or revision shall, on an order being passed in that behalf by the

Court or authority before whom such suit or proceeding is pending, stand abated. Such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authority under and in accordance with the provisions of the Act and the Rules made thereunder. S. 6 deals with cancellation of notifications issued under s. 4 and says that it shall be lawful for the State Government at any time to cancel the notification made under s. 4 in respect of the whole or any part of the area specified therein. S. 7 provides that the District Deputy Director of Consolidation shall cause the village maps to be revised. S. 8, similarly deals with the revision of the Field Book and the current Annual Register, and with the determination of valuation and shares in joint holdings. Under s. 9(1), the Assistant Consolidation Officer has to send to tenure-holders concerned and other persons interested, notices containing relevant extracts from the current Annual Register and other records showing their rights and liabilities, mistakes and disputes that had been discovered, shares of any tenure-holders in joint holdings, valuation of plots, trees, wells and improvements. Under s. 9(2) any person to whom a notice under sub-s. (1) has been sent, or any other person interested may file an objection in respect thereof disputing the correctness or nature of the entries in the records or in the extracts furnished to him or in the Statement of Principles or the need for partition. S. 9-A gives the procedure for the disposal of cases relating to claims to land and partition of joint holdings. S. 49 places a bar upon the jurisdiction of Civil Courts. It enacts that the declaration and adjudication of rights of tenure-holders or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought

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to have been taken under the Act, shall be done in accordance with the provisions of the Act and no civil or revenue court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matter for which a proceeding could or ought to have been taken under the Act.

The argument advanced is that arbitrary powers have been conferred upon the State Government under ss. 4 and 6 inasmuch as it can discriminate between district and district, and village and village in the same district, in the matter of selection of areas to be brought under consolidation operations. Likewise, it has unlettered power to de-notify the operations under s. 6 in one district and not in another, or in one village in the same district but not in another. A different procedure has been prescribed under ss. 5, 7 and 8 for the revision of Village Maps, Field Books, Annual Registers, etc. that is prescribed in the Land Revenue Act. The power to use or transfer one's property has been restricted to a large extent. The jurisdiction of existing civil and revenue Courts even in pending matters has been taken away under s. 5(2) as all such proceedings shall stand abated. A person will be forced to seek his remedy before a different set of Courts or authorities than a person whose holding does not fall within the area under operation. The upshot of the argument is that two different procedures, two different sets of Courts, and different rights of appeal and revision are prescribed under the Act and thus while some citizens will be governed by one set of rules, procedural and jurisdictional, another class of citizens will be governed by wholly different sets of rules, which fact creates an insidious discrimination in contravention of Art. 14 of the Constitution.

The Act is a special Act. Its object is to provide for consolidation of agricultural holdings by cheap means and in a speedy manner. A Legislature has the power to create new Courts or tribunals and vest them with jurisdiction by divesting existing Courts of their jurisdictions. It has the power to legislate and provide for a different procedure for the disposal of cases. Art. 14 of the Constitution forbids, class legislation. It does not forbid reasonable classification. To pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from those left out of the group, and (2) that that differentia must have a rational relation to the objects sought to be achieved. The Legislature has classified areas under consolidation operations from areas which are not under such operations. All areas under consolidation operations will have to be governed by the same set of Rules. There is no discrimination *inter se* between person and person or individual and individual, or transaction and transaction in respect of the areas which are under consolidation operations. The classification thus is founded on intelligible differentia. It has also a rational relation to the object sought to be achieved. The object is the consolidation of holdings in a cheap and speedy manner. Once other areas are also brought under consolidation operations, the same law and the same procedure will govern those areas also. The paucity of staff and finance may compel a State not to bring the whole State, or a whole district, under consolidation operations simultaneously. The restriction on use and transfer of property is a reasonable one. There is no absolute bar. User has been restricted one. There is no absolute bar. User has been restricted so that agriculture may develop. Likewise, transfer has been

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restricted to avoid complications in the allotment of compact Chaks. The constitutionality of the Act, as amended up to 1957, came up for consideration in *Attar Singh's* case (1) and its constitutionality was upheld by the Supreme Court. To our mind, the provisions of the Act that were challenged before us, are not hit by Art. 14.

The learned counsel for the appellants then referred to the so-called unreasonableness of the provisions contained in Ss. 9(2) and 9-A of the Act. His contention is that s. 229-B(3), U. P. Zamindari Abolition and Land Reforms Act lays down that in a suit by a person claiming to be a Bhumidhar or Sirdar, the State Government and Gaon Sabha shall be impleaded as parties. S. 9(2), or s. 9-A, however, have not made a similar provision for the joinder of the State Government and Gaon Sabha as necessary parties to an objection. This change in the procedure, it is contended, is wholly unreasonable inasmuch as in the absence of the State Government and the Gaon Sabha as parties, no finality can attach to the adjudication of an objection. It was argued that the ownership of land vests in the State or the Gaon Sabha and it is necessary that in a suit by the rival tenure-holders, the supreme proprietors of the land are impleaded as necessary parties. It is true that what is mandatory under s. 229-B is not so under s. 9(2) or s. 9-A. The Legislature, however, has plenary powers to enact a law within its legislative field and in doing so, to provide a procedure different from a procedure obtaining under any other statute. The change in procedure, therefore, will not invalidate the special Act. Besides, there appears to be no bar on a tenure-holder or claimant impleading the State or the Gaon Sabha in his objection filed under s. 9(2) of the Act. The argument of the learned counsel is that only tenure-holders

(1) A.I.R. 1960 S.C. 564.

are entitled to file an objection under s. 9(2) and since the State Government or the Gaon Sabha are not and cannot be tenure-holders, therefore, they cannot file an objection themselves. This argument does not appear to be well-founded in law. S. 2(1)(a) makes it obligatory for the Assistant Consolidation Officer to send or cause to be sent, to the tenure-holders concerned and 'other persons interested' notices containing relevant extracts from the current Annual Register and such other records as may be prescribed. Such notices are obviously sent so that a tenure-holder or interested person may file an objection, if he so wishes. S. 9(2) says that any person to whom a notice has been sent, or any other person interested may file an objection disputing the correctness or nature of the entries in the records or in the extracts, or in the Statement of Principles or the need for partition. That being so, the provision makes it amply clear that the objection can be filed not only by a tenure-holder to whom a notice has been sent but also by 'any other person interested'. It does not mention that such interested person must also be a tenure-holder. The language is wide enough to include a tenure-holder or any person other than a tenure-holder. Gaon Sabha land or Nazul land may happen to be recorded in the name of some person although that person may have no title thereto. In such a case s. 9(2) does not prohibit or forbid the State Government or the Gaon Sabha from filing an objection claiming that land as against the person whose name is recorded in the village papers. The argument of the learned counsel, however, is that the word 'person' cannot include the Gaon Sabha or the State Government. The word 'person' is defined by cl (33) of U. P. General Clauses Act. According to this definition, 'person' shall include any company or association or body of individuals whether incorporated or not. In dealing

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with an inclusive definition it will be inappropriate to put a restrictive interpretation upon terms of wider connotation. Under cl (g) of s. 2, U. P. Panchayat Raj Act, 'Gaon Sabha' means a 'Gaon Sabha' established under s. 3. Under s. 3, the State Government has to establish a Gaon Sabha by notification in the official *Gazette*. Under s. 4, every Gaon Sabha shall, by the name notified in the official *Gazette*, be a body corporate having perpetual succession and a common seal and shall have power to acquire by purchase, gift, or otherwise, to hold, administer, and transfer property, both movable and immovable, and to enter into any contract, and shall, by the said name, sue or be sued. A Gaon Sabha is thus a juristic person incorporated by statute. It is, to our mind, covered by the word 'person' occurring in ss. 9(1)(a) and 9(2). The word 'person' is also wide enough to include the State Government, unless such inclusion would be repugnant to the context in which the word is used in s. 9(1)(a) or s. 9(2). The context does not exclude the State Government. The result thus is that a Gaon Sabha or a State Government can file an objection. A tenure-holder or any other person can also implead, either or both as a party to the objection if they have any interest in the subject-matter of the dispute. In a majority of cases, the dispute will relate to some land in which rival claimants are interested and not either the State Government or the Gaon Sabha and it is immaterial in such a case as to who wins and who loses. Either of them will be accountable only for the land revenue. We are, therefore, of the view that the omission of the Legislature to insert a provision for impleading the State or the Gaon Sabha as a party, does not contravene any Article of the Constitution.

We shall now come to the merits of the appeal. The first attack of the learned counsel for the appel-

lants is that the finding of the Deputy Director, Consolidation as to title, is based on inadmissible evidence. It appears that the respondent *Sia Ram* had instituted a suit for partition under s. 176, U. P. Zamindari Abolition and Land Reforms Act, against the appellants in the revenue Court. Ann. 2 is the copy of the plaint in that suit. It shows that *Sia Ram* had claimed a half share in the *Khata* recorded in the names of the appellants, situate in village *Lonapur*. Ann. 3 is the copy of the written statement filed by the appellants in that suit. Ann. 4 is the copy of the compromise filed by the parties on the basis of which, that suit was decided on 23rd July, 1969. The *Khata* of *Lonapur* was divided between them, and while certain specific plots were allotted exclusively to *Sia Ram*, the remaining went to the lot of the appellants. Para. 1 of that compromise reads thus:

*"Yeh ke muddaalehim 1 laghayat 5 ne.
aaraazi waqae Bharwara men bhi tasleem kiya hai
aur muddai ka hissa ½ tasleem kiya hai."*

The *Bharwara* plots, that is to say, the plots now in dispute, were not the subject-matter of litigation in that suit. The contention is that the compromise extinguished the title of the appellants as to half and operated to create, declare or assign the title of the respondent as to the other half in respect of the disputed plots of the value above Rs.100 and, therefore, the documents was compulsorily registerable under s. 17(1)(b), Registration Act and having had not been registered, it cannot be admitted in evidence in proof of the recital, notwithstanding the proviso to s. 49 of that Act. The purport of s. 17(1)(b) is that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs.100 and upwards to or in immovable property, shall be compulsorily registerable.

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Under s. 49, no document required by s. 17 to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property, unless it has been registered. The learned counsel for the appellants has placed reliance on four cases, namely, *Datto v. Baba Saheb* (1); *Ram Dular v. Raj Karan Pandey* (2); *Ram Gati Chaubey v. Ram Adhar Chaubey* (3) and *Chandra Bhan Datt Ram Pandey v. Jagdish Datt Ram Pandey* (4) for the proposition that the compromise is not admissible in evidence on the question of proof of title. In *Datto's* case (1) the document created or purported to create a permanent tenancy and although it fell within the mischief of s. 17, Registration Act, it was not registered. The Bombay High Court held that s. 49 applied and the document could not affect the immovable property compromised therein or be received as evidence of any transaction affecting such property. It is apparent to us that the point decided was that the document requiring registration would not create title or be received as evidence on the question of title, unless it was registered. The point whether it could be received as evidence of admission of a party to a document or as a recognition of an antecedent title, did not arise for consideration in that case and it cannot be taken to be an authority on that point. In *Ram Dular's* case (2) one *R* made a usufructuary mortgage in favour of one *B* in 1923. *R* sold the equity of redemption in favour of Ram Dular on 26th May, 1927 for a sum of Rs.500 on the foot of a registered sale-deed. Ram Dular then instituted a suit for redemption against *B*. *B* resisted the suit by setting up an unregistered sale-deed dated 18th February, 1927 for a sum of Rs.50 in respect of the same equity of redemption. In addition, he also pleaded that his permissive possession as a mortgagee

(1) A. I. R. 1934 Bom 194.

(3) 1961 A.L.J. 440 (F.B.).

(2) 1960 A.W.R. 113.

(4) 1962 A.L.J. 404.

had extinguished on his taking a sale and since the date of the sale he was in adverse possession as full owner. The ratio of the decision is that where an immovable property is in possession of the usufructuary mortgagee and the mortgagor proposes to sell the equity of redemption to the mortgagee, the sale can be effected only by a registered instrument. Further, that an unregistered sale-deed transferring equity of redemption of the value of less than Rs 100 to the mortgagee in possession is ineffective on account of the provisions of s. 54 of the Transfer of Property Act. It was also held that s. 49, Registration Act is applicable to all documents which are required to be registered either by s. 17, Registration Act or by any provision of the Transfer of Property Act. In consequence of these two findings, it was held that the unregistered sale-deed was not admissible in evidence in proof of the transfer of the equity of redemption. Lastly, it was held that when the unregistered sale-deed could not be admitted in evidence in proof of title, it could not yet be treated as a sale so as to convert the permissive possession as a mortgagee into adverse possession as a vendee. It is thus clear that this decision has also no relevancy to the point in controversy before us. The question whether an admission or recognition contained in such a deed can or cannot be relied upon, is beyond the purview of that decision. In *Ram Gati Chaube's* case (1), the parties had entered into a compromise in a mutation case, on the basis of which some specific properties were given to the rival parties as absolute owners and it was stipulated that they will have no title to or concern with the properties given to the other party. The S. D. O. passed an one word order 'approved', without incorporating the said terms in his order. The Full Bench formulated six questions but decided only the first two, namely, whether the order of the mutation

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(1) 1961 A. L. J. 440 (F.B.).

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Court embodied the petition of compromise and whether the said compromise declared rights to immovable property worth more than Rs.100 and was inadmissible in evidence for want of registration. The Full Bench held that had the S. D. O.'s order explicitly recorded the entire compromise, no problem would have been posed. However, the order could be deemed to embody only those provisions which specify the properties to be mutated and it could not be deemed to refer to and embody those provisions of the compromise which declared the parties to be the absolute owners. The other questions about admissibility of the compromise compromised in questions nos. 3 to 6 remained unanswered. That being so, this case also does not help the appellants. In *Chandra Bhan Datt Ram Pandey's* case⁽¹⁾, Jamwanti Kaur was the limited owner of Zamin-dari properties in several villages. One C and J were the collaterals of her deceased husband and they claimed succession in preference to Jamwanti Kaur. The parties entered into a compromise on 14th October, 1936 by which they agreed to share the properties which they might be able to secure half and half. After entering into this compromise C and J instituted a suit in the Chief Court against Jamwanti Kaur. The parties entered into a fresh compromise and the suit was decreed in terms of that on 3rd June, 1938. According to this compromise C and J became entitled to inherit the properties on the death of Jamwanti in equal shares but village Dhanepur was to go exclusively to C. After this compromise decree, C and J entered into yet another compromise on 4th September, 1943 by which the properties were agreed to be divided half and half with the stipulation that village Dhanepur was to go to C exclusively. Jamwanti Kaur died in 1947 and there-upon applications for mutation of names were made by

(1) 1963 A. L. J. 404.

both and a compromise was arrived at in the course of the mutation proceedings. That compromise narrated that (1) the dispute between them had been settled earlier by way of a family settlement and that both parties were jointly entitled to the entire properties in dispute, (2) the property had not till then been actually partitioned by metes and bounds and that the two parties would thereafter be the owners of the properties mentioned in Lists A and B exclusively, (3) the property mentioned in List A was to go to J and the property mentioned in List B to C, and (4) though Dhanepur was in List B income from Tahbazari of Dhanepur will be shared by both the claimants half and half and that both of them would be entitled to manage the holding of the market and the collection of the Tahbazari. C utilized the Tahbazari exclusively for some years. J then instituted a suit for a half share in the Tahbazari dues. The suit was resisted on the ground that the compromise application was unregistered and the stipulation relating to the realization of the Tahbazari dues was a stipulation in respect of an immovable property of the value of above Rs.100 and required registration under s. 17(1)(b), Registration Act. The argument was sought to be met by the plea that though the document required registration, the purpose for which it was being relied upon was a collateral purpose. The decision of the Division Bench was that upon terms of the compromise, it was clearly a partition deed which declared, assigned, limited or extinguished the rights, title and interest of the parties in the properties dealt within it. It was further held that the mutation Court was concerned only with the question of possession and not of title. It was also observed that the compromise decree was silent in respect of the stipulation about the collection of Tahbazari dues, and it cannot be said to have been incorporated in the order of the mutation Court

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and thus *J* could derive no advantage from the mutation order as it did not incorporate that term. *J* had to fall back upon the compromise application. It was observed that the right to manage a market and the right to realize Tahbazari dues are immovable property and the compromise petition required registration. The Division Bench finally observed that the compromise was not being utilized for a collateral purpose but for the enforcement of the stipulation and, therefore, it could not be admissible in evidence. In that case, the crucial question that came up for decision was whether *J* had a right to hold the market and share the Tahbazari dues. This matter was foreign to the nature of the mutation case which was concerned only with the recording of names of parties over specific properties. The unregistered compromise was being relied upon in proof of title of *J* and that is why it was held that not being registered, it could not be received in evidence. The four cases relied upon by the learned counsel, in our view, are easily *distinguishable*.

On the other hand, the learned counsel for the respondent has placed reliance upon a large number of cases in support of his contention that notwithstanding non-registration, the compromise between the parties in the instant case can be relied upon as a piece of admission on the part of the appellants, or as a piece of evidence, or as recognition of an antecedent title. The compromise, Ann. 4, recites that the parties had come to terms. With regard to Lonapur properties it was recited what specific plots will be held by which party. With regard to the property now in dispute, it was mentioned that the appellants had admitted (*Tasleem kiya hai*) that the respondent had a half share. There was then a prayer that the mutation case be decided in accordance with the terms of the compromise and neces-

sary entries be made in the village records. The order passed by the S D O has, however, not been filed to show that the terms regarding the property now in dispute were not incorporated in the order. We are prepared to proceed on the assumption that the terms were not incorporated. The fact, however, remains that before the compromise was filed in the mutation Court, the parties had arrived at a settlement between themselves with regard to both the properties, one the subject-matter of dispute in that case, and the other not. In respect of the other, now in dispute, the appellants made a categorical admission that the respondent had a half share. It follows, therefore, that what they did was that the appellants recognized the existing title of the respondent and said that their share was half. A recognition of title or definition of a share on the basis of that recognition cannot be treated as creating, declaring, assigning, limiting or extinguishing, and right, title or interest in immovable property. Such a recognition may be oral or by a document, and if in a document, it would not require registration. *Hiren Bibi v Sohan Bibi* (1), *Devi Dayal v Wazir Chand* (2) and *Sailesh Chandra Sarkar v. Bireswar Chatterjee* (3) have taken the view that an unregistered document can be relied upon in proof of admission of title. In *Hiren Bibi's* case (1), the Privy Council observed that such a compromise can in no sense of the word be an alienation of property but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties. In *Devi Dayal's* case (2) there was a rent deed which stated that one particular property was owned by the members of the family in equal shares and in another particular property one of the executants had a 3/4th share while

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(1) A I R 1914 P. C. 44.

(2) 61 I C 328.

(3) A I R 1930 Cal 589

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the rest had a 1/4th share. It was urged that the lease, being for a period of more than one year and not being registered, was not admissible in evidence under s. 49, Registration Act. The Lahore High Court held that as a lease or as a document to prove title, it was not admissible, but there was no reason why the admission contained therein cannot be taken in evidence. In *Sailesh Chandra's* case (1), a lease was created by a decree based on compromise, which compromise decree was not registered. In addition, it contained a recital that the disputed land did not pertain to the Jama of Rs.91. The Calcutta High Court held that it could not be disputed in view of the decision of the Judicial Committee in *Rari Hemanta Kumari Devi v. Midnapur Zamindari Co.* (2) that the Sulehnama should have been registered in order to be effective as a lease but at the same time the statement in the Sulehnama, namely, that the lands did not pertain to the Jama of Rs 91 might be admitted as evidence as admission made by the parties to the same. As such admission, it would only be a piece of evidence and it would be open to the party who made the admission to show that it was made in circumstances which did not make the admission binding on him. The decision in *Ram Gopal v. Tulsi Ram* (3) is clear that such a recital can be relied upon as a piece of evidence. In that case, a family settlement was arrived at in a mutation case by which the three parties agreed to mutation to the extent of 1/3rd each. The compromise was not registered. The Full Bench laid down five propositions and the fifth one reads thus :

“If the terms were not reduced to the form of a document”, registration was not necessary (even though the value is Rs.100 or upwards); and, while the writing cannot be used as a document

¹ I.R. 1980 Cal 559.

(2) A.I.R. 1919 P.C. 79

(3) A.I.R. 1928 All 641 (F.B.).

of title it can be used as piece of evidence for what it may be worth, e.g., as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct."

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It is clear, therefore, that the compromise can be taken into consideration as a piece of evidence. The next case relied upon is *Bakhtawar v. Sunder Lal* (1). This deals with a compromise arrived at in a mutation case. The compromise recited that the parties had already composed their differences regarding the property and had come to an arrangement between themselves by which their names were to be entered in respect of specific property therein. It was held that there was no necessity to have the compromise registered, as it did not create, assign, limit, extinguish or declare any title. It contained merely recital of fact by which the Court was informed that the parties had come to an arrangement. To sum up, therefore, we are of the view that the compromise could have been relied upon as an admission of antecedent title.

The next contention of the learned counsel is that there was practically no evidence on the basis of which the finding with regard to title could have been given. This contention does not appear to be well founded. The appellants had examined Shyam Sunder, Putti Lal and Dwarka whereas the respondent had examined himself and one Raghunath. The learned Deputy Director was entitled to believe one set of witnesses and not the other. This Court cannot undertake a reappraisal of the same evidence. The finding of the learned Deputy Director was criticized on the ground that there was no evidence to show that the original tenant was Bhikham, the common ancestor of the parties.

(1) A.I.R. 1926 All. 175

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The learned Deputy Director perhaps referred to Shyam Sunder's admission about it in his evidence, Ann. A. It is also argued that assuming that some plots were ancestral, however, Ram Ratan was ejected from those plots in 1340 F. and thereafter there was a resettlement by the Zamindar Jeewan Bux in favour of Ram Ratan and, therefore, Sia Ram had lost his title on account of that resettlement under the Oudh Rent Act, which was then in force. We are not inclined to attach any significance to this argument. No documents were produced to prove the ejection of resettlement. Reliance was placed merely on oral evidence. One Chandrapal Singh was said to be a witness of the resettlement, but he was not examined and nor the Patta was exhibited. It is in these circumstances that the learned Deputy Director came to the finding that the Khata was ancestral. This is a pure finding of fact and cannot be disturbed.

Altogether, therefore, this appeal has no substance and is dismissed with costs.

'Appeal dismissed.

CRIMINAL REVISION

*Before Mr. Justice Yashodanandan and
 Mr Justice P. N. Bakshi*

GAURI RAM

APPLICANT,

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July, 2nd.

STATE OF UTTAR PRADESH

OPPOSITE-PARTY.

Telegraph Wire (Unlawful Possession) Act,
Test.

1950, s 2(b)—

A mere visual appreciation of the colour and lustre of the wire coupled with the measurement of the diameter is not sufficient to establish that the wire in question was copper wire which came within the prohibited category of telegraph wire as defined in s 2(b) of the Act.

—s 5—*Offence under the section not proved—Conviction under ss 379 and 411 of the Indian Penal Code, if justified.*

While mere possession is punishable under the Telegraph Wire (Unlawful Possession) Act, dishonest possession alone is punishable under ss 379 and 411, I. P. C. If a person can give a reasonable explanation for his possession he cannot be found guilty under ss. 379 and 411, I. P. C. But if the same person was being prosecuted for an offence under the Telegraph Wire (Unlawful Possession) Act, his explanation is of no consequence. Even though his possession might be innocent and honest he would still be guilty under the Telegraph Wire (Unlawful Possession) Act. Thus the ingredients of the offence under the two Acts being different he cannot be convicted under ss 379/411, I P C. in the absence of a charge.

Criminal Revision no. 2035 of 1969 from the order of P .N. DUBEY, Temporary Civil and Sessions Judge, Mirzapur.

C. S. Saran and N. P. Midha, for the Applicant.

P. N. BAKSHI, J. :—Gauri Ram was convicted by the Sub-Divisional Magistrate, Robertsganj, under s. 5 of the Telegraph Wire (Unlawful Possession) Act and sentenced to one year's rigorous imprisonment. He filed an appeal which was dismissed by the Temporary Civil and Sessions Judge, Mirzapur on 5th November, 1969. Thereafter he has come up in revision to this Court. The revision came up for hearing before the learned single Judge who has referred this case for disposal by a Bench.

The case for the prosecution is that the accused was found in possession of six and half kgs. of telegraph wire at 8.25 p.m. on 7th July, 1968 in village Ninga in contravention of the provisions of s. 5 of the Telegraph Wire (Unlawful Possession) Act hereinafter called the

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Act. That Pratap Singh (P. W. 2), Station Officer of Police Station, Chopan, received information through an informer on 7th July, 1968 that the applicant along with others had gone for cutting the telegraph wire. He collected Bhola (P. W. 3) and Naradmuni (P. W. 4) and proceeded to village Ninga accompanied by a posse of police constables from the outpost. About half a mile south of village Ninga near the telegraph line they heard the movements of some persons. It was about 8.15 p.m. On lighting their torches they saw five or six persons rolling copper wire. A chase was given to them. All except the applicant escaped. The applicant was caught near poll no. 129/8. On search being taken six and half kgs. of wire was recovered from his Jhola. Recovery memo Ext. Ka-2 was prepared on the spot in the present of the witnesses. The accused applicant was brought to the police station and a case was registered against him under the aforesaid Act.

Bashistha Misra, S. I II (P. W. 7) conducted the investigation of the case. He interrogated the witnesses, prepared site-plan Ext. Ka-6 of the place where the applicant was arrested with the incriminating article. He took the torch in his possession and prepared its memo Ext. Ka-7. The wire was sent for examination to Shri Ram Mohan Khare (P. W. 1), Assistant Engineer, Telephone, Varanasi. On receipt of his report to the effect the wire in question was telegraph wire, Sheo Narain Singh (P. W. 5), the then Station Officer, submitted the charge-sheet against the accused. Sanction for prosecution was duly obtained as required under s. 7(1) of the Act. The Superintendent of Police, Mirzapur, was authorised to file the complaint under s. 5 of the Act. The prosecution in support of its case examined Pratap Singh (P. W. 2), Station Officer, Chopan, Bhola (P.W.3) and Nardmuni (P W. 4) as witnesses of fact and Sri Ram Mohan Khare (P. W 1) as the expert of the telephone wire.

The accused applicant denied his guilt. According to the applicant he was arrested by the police from his house. Subhan (D. W. 1) and Lalai (D. W. 2) were produced in support of the defence case. In their statement under s. 342 of the Criminal Procedure Code the accused stated that the prosecution witnesses were deposing under the police pressure. Subhan (D. W. 1) is the neighbour of the accused and Lalai (D. W. 2) is his father. Regarding the time, place and manner of the arrest we have the statements of Pratap Singh (P. W. 2), Station Officer, Chopan, Bhola (P. W. 3) and Naradmuni (P. W. 4). Pratap Singh has stated that on receiving information from an informer at Obra that some persons had gone to cut wire towards the village Ninga, he collected Bhola and Naradmuni and some police force and proceeded towards that village. About half a mile south to the village near the telephone line they heard some *ahat*. On throwing their torch light they saw five or six persons rolling the wire. In spite of a chase being given the miscreants ran away, except the accused who was caught near pole no. 129/8. A jhola was found in the hand of the applicant which contained six and half kgs. of wire. The accused was brought to the police station and an entry was made in the general diary at report no. 8 copy of which is Ext Ka-3. Bhola (P. W. 3) and Naradmuni (P. W. 4) are public witnesses. They corroborated the prosecution story in all its material particulars. We have perused the statements of these witnesses but we do not find any contradiction or any other infirmity therein for rejecting their statements. Both the courts below have relied upon these statements and we are in complete agreement with the finding of fact that the wire in question was recovered from the possession of the accused-applicant at the date, time and place as alleged by the prosecution.

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The crucial question, however, which has to be decided is, whether the wire in question was "telegraph wire" within the meaning of s. 2(b) of the Telegraph Wire (Unlawful Possession) Act S. 2(b) of the Act runs as follows .

"(b) 'Telegraph wire' means any copper wire the guage of which, as measured in terms of pounds per mile is between 147 and 153 or between 196 and 206 or between 294 and 306."

The case for the prosecution is that the statement of (P. W. 1) Sri Ram Mohan Khare, Assistant Engineer, Telephone, who has been produced as the expert witness, fully establishes that the wire in question was 'telegraph wire'. We shall, therefore, scrutinise his statement. Shri Ram Mohan Khare received the wire in dispute on 30th August, 1968 in a sealed packet through constable Badruddin. He opened the sealed packet and measured its diameter. The measurement was 2.82 m.m. He then examined the colour and lustre of the wire. Thereafter he arrived at the conclusion that the sample of wire which he had examined was copper wire. In his examination-in-chief Shri Ram Mohan Khare has stated thus :

"Main sealed packet ko khola to usme do tar mila unka diameter napne par 2.82 m.m. mila Taronke rang lustre aur diameter se gyat hua ki vr tar ke coils 200 pound parti meel tambe ke tar ke tukare hain. Yeh telegraph wires hai aur is telegraph wire unlawful ke antargat adta hai."

The witness when subjected to cross-examination stated as follows :

"Tar jo gaya tha uski density nahi nikali thi. Density se nahi malum hota ki kaun kaun se alloy mile hue hai. Maine tar ke rung aur uske chamak aur gauge se aya kiya ki wah tar pure copper hai."

200 pound pratimeel tambe ke tukra hai. Maine koi bhi metallurgical test nahi kiya aur na uske karane ke avasyakata thi. Usi teen bato se taya kiya ki pure copper wire telegraph hai. Iska koi scientific test nahi hai, aur na maine kiya. Agra telegraph wire me aur koi dhatu mili hogi to uska, gauge vary kar jata hai, aur isliye wah aapane department ka tar nahi rah jata."

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On the basis of this statement it was urged by the counsel for the State that the prosecution has succeeded in proving that the wire recovered from the possession of the accused-applicant was telegraph wire belonging to the department within the meaning of the Act. We are, however, not satisfied how a mere look at the colour and lustre of the wire coupled with the measurement of the gauge could lead to a conclusion that the wire in question was copper wire. As such we summoned Sri Ram Mohan Khare before us so that he could satisfy us on this question. We questioned Sri Khare regarding the test which he had performed in arriving at the conclusion that the sample of wire tested the diameter of the wire by means of a micrometer before us Shri Khare claimed to have first measured the diameter of the wire by means of a micrometer screw gauge. Having thus ascertained the gauge of the wire Shri Khare claims to have taken recourse to the Line Construction Code of the Posts and Telegraph Department. By comparing the gauges of the wire in the table provided in that Code he found that the gauge of the wire tallied with 200 pounds per mile copper wire of the department. He then examined the colour and lustre of the wire and came to the conclusion that it was telegraph wire of the weight of 200 pounds per mile belonging to the Posts and Telegraph Department. Shri Khare thus repeated the same version before this

Shri Ram Mohan Khare depended solely upon his vast experience and ocular ability to conclude that the wire in question was a copper wire, within the meaning of the Act. To clarify matters further we questioned Shri Chakravarti and asked him if it was necessary that all the three tests mentioned above must be conducted before a final opinion can be given that a particular wire is copper wire or whether the same could be determined by undertaking any one of the above mentioned three tests. His reply was that "It is necessary that all the three tests must be conducted before it can finally be held that the wire is copper wire as is prohibited under the Act." This answer given by the witness has put an end to the entire controversy in the case. The tests which ought to have been conducted as per statement of Shri C. R. Chakravarti have not been so conducted in the case before us. A mere visual appreciation of the colour and lustre of the wire coupled with the measurement of the diameter is in our opinion not sufficient to establish that the wire in question was copper wire which came within the prohibited category of telegraph wire as defined in s. 2(b) of the Act. Our observation should by no means be construed to mean that we are laying down any particular mode of testing the genuineness or otherwise of the copper wire belonging to the Telegraph Department. That is not the matter with which we are concerned. It is for the department to lay down its tests. All that we have decided in the present case is that the tests conducted herein are not sufficient to establish that the wire in question was copper wire, the possession of which is prohibited and punishable under the said Act.

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As the last resort counsel for the State has submitted that even if the offence is not proved under the Telegraph Wire (Unlawful Possession) Act yet the accused-

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Court which he had given before the Sessions Court. He did not throw any further light on the question at issue. We were not at all satisfied with his statement and, therefore, we summoned Shri C. R. Chakravarti, Assistant Engineer, Lines and Wires and Cables, Office of the Senior Electrical Engineer, Calcutta (West Bengal). The statement of Sri Chakravarti has been very frank and has dispelled some of the doubts which we had regarding the proper test necessary for coming to a conclusion whether a particular wire is copper wire, within the meaning of the Act. Sri Chakravarti stated as follows:

"In our department in order to test as to whether a particular sample is copper wire of the Posts and Telegraphs Department or not we measured the diameter of the wire with the said of amicro-meter screw guage, the weight and we find out the resistance of the wire. On the basis of these datas we can conclude as to whether the wire is of the Post and Telegraphs Department or not. In this particular case, it appears that Mr. Ram Mohan Khare on account of his experience by examining the wire visually on account of its lustre and colour concluded that it was copper wire. After measuring the diameter, he could definitely work out that one mile of copper wire would weight 200 lb. copper wire of this weight and diameter is wire of the Post and Telegraphs Department."

From the above statement of Sri Chakravarti it appears to us that in the case before us even though according to his statement three tests are carried out by his department, namely : (a) measurement of diameter : (b) taking of weight, and (c) finding out the resistance of wire,

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applicant can be convicted for the minor offence under s. 379/411 of the Indian Penal Code. Counsel for the accused argues that the minor offence which has been made culpable under s. 238 of the Criminal Procedure Code must be one under the same Act of which the major offence has not been proved. We have examined this argument carefully. We do not agree with the contention of the counsel for the applicant for the simple reason that the word 'offence' has been defined in s. 4(o) of the Criminal Procedure Code which reads as follows :

"(o) 'Offence' means any act or omission made punishable by any law for the time being in force ;
It also includes any act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act, 1871 (1 of 1871)."

On a perusal of s 238 of the Criminal Procedure Code we find that "when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it." S. 238 of the Criminal Procedure Code does not lay down any limitation on the definition of the word 'offence'. The said word as mentioned above has been defined in s.4(o) of the Act. The definition applied to "any act or omission" punishable by any law "for the time being in force." As such we do not find any justification in law for accepting the submission of counsel for the accused-applicant. What is a minor offence would depend upon the sentence which is provided by law for that offence. An offence under s. 379/411 is punishable by three years' rigorous imprisonment while an

offence under the Telegraph Wire (Unlawful Possession) Act is punishable by five years' rigorous imprisonment. In that sense the offence under s. 379/411 of the Indian Penal Code would certainly be a minor offence. But there is yet another difficulty in our way. The difficulty is that while mere possession is punishable under the Telegraph Wire (Unlawful Possession) Act dishonest possession alone is punishable under s. 379/411 of the Indian Penal Code. A person may in good faith have purchased an article which may ultimately be found to be stolen. If he can give a reasonable explanation for his possession he cannot be found guilty under s. 379/411 of the Indian Penal Code. But if the same person was being prosecuted for an offence under the Telegraph Wire (Unlawful Possession) Act, his explanation is of no consequence. Even though his possession might be innocent and honest he would still be guilty under the Telegraph Wire (Unlawful Possession) Act. Thus we find that the ingredients of the offence under s. 5 of the Telegraph Wire (Unlawful Possession) Act are different to the ingredients of the offence under s. 379/411 of the Indian Penal Code. As such in the absence of a charge under s. 379/411 of the Indian Penal Code we are unable to convict the accused under this section.

Having thus considered the entire evidence on the record and the questions of law that have arisen in this case we are of opinion that the guilt of the accused has not been established for the offence for which he had

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APPELLATE CIVIL

Before Mr Justice S. D. Khare and Mr. Justice
K. B. Srivastava*

1972
April, 3

STATE OF U P AND ANOTHER

APPELLANTS,

v.

BADLANI LAKSHMAN

GOVIND AND OTHERS

... RESPONDENTS.

Constitution of India, Art. 14—Discrimination—Protection against—Extends to executive action also.

The protection against discrimination afforded by Art. 14 extends not merely to legislative action but also to executive action in exercise of express statutory powers.

State of West Bengal v. Anwar Ali (1) and Basheswar Nath v. Income-tax Commissioner (2) relied on.

Civil Service—Selection for promotion—Adverse entry in the Character roll against which appeal was pending—Consideration of, at the time of selection—Adverse entry subsequently ordered to be expunged—Propriety of selection—Principle of natural justice —Violation of—Forest Service Rules, 1952 Appendix B.

Held: in making the selection of Assistant Conservators of Forest from amongst the Forest Rangers in the year 1964, without keeping one post vacant for the petitioner in case after his appeal had been allowed and he was considered fit for permanent appointment to the post of Assistant Conservator of Forest, there can be no doubt that the Chief Conservator of Forest and the State Government did not act fairly and the petitioner has suffered for no fault of his. In the circumstances of the case there can be no doubt that the rules of natural justice were violated.

*While sitting at Lucknow.

(1) A.I.R. 1952 S.C. 75.

(2) A.I.R. 1959 S.C. 149.

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Union of India v. P. K. Roy (1) and *Poonamalli Ramayya v. State of A. P.* (2) relied on.

Special Appeal No. 157 of 1969 against the judgment and order dated 13th July, 1969 passed by GURSHARAN LAL, J. in Writ Petition no. 323 of 1968

Advocate General, *Umesh Chandra*, for Appellants

P. C. Srimal, *B. R. Gu.* and *R. N. Trivedi*, for Respondent no 1

H. D. Srivastava and *S. P. Pathak*, for Respondent nos. 2 and 7.

P. C. Sriswal, for Respondent nos 4 and 5.

B. C. Saxena, for Respondent no 6

S. D. KHARE, J.:—This is a special appeal directed against an order dated 13th August, 1969, passed by a learned single Judge of this Court, allowing the writ petition filed by Badlani Lakshman Govind Ram and quashing the selection evidence by the preparation of Lists 'A' and 'B' in Ann. III to the writ petition and the notifications and Anns. 10, 11, 12 and 13 to the writ petition based on the said selection. The reversion of the petitioner which had taken place as a result of the aforesaid selection was also quashed.

The facts leading to this special appeal, briefly stated, are that the petitioner Badlani Lakshman Govind Ram was appointed on 1st April, 1948, as a temporary Forest Ranger in Uttar Pradesh. He was confirmed as Forest Ranger on 31st February, 1949. About seven years later he was promoted to the post of Assis-

(1) A.I.R. 1968 S.C. 850.

(2) A.I.R. 1969 A.P. 21.

tant Conservator of Forest in an officiating capacity and had continued to officiate as such till the date of the filing of the writ petition in the year 1968. In the year 1964 the recruitment of Assistant Conservators of Forest from amongst the Forest Rangers by way of promotion was ordered to be held according to the U. P. Forest Service Rules, 1952 (hereinafter referred to as the Rules). The petitioner was senior enough to be considered for such selection, but he was not approved for permanent absorption as an Assistant Conservator of Forest because for the year 1960-61 an adverse entry had been made in his character roll without any just cause and due to the *mala fides* of the immediate boss and the same could not be expunged till the year 1967. The bad entry in his character roll, which was extremely damaging and revealed that he was not a straight officer and his integrity was doubted, was communicated to the petitioner for the first time on 1st August, 1963, that is to say, more than two years after the entry was expected to have been made. The petitioner filed an appeal against that adverse entry in the month of November, 1963, but it could not be disposed of till 16th December, 1967, when the adverse entry was ordered to be wholly expunged.

About two months after the petitioner had filed an appeal against the adverse entry which had been made in the character roll, the State Government ordered that a selection for eleven permanent posts and of fifty-one persons for officiating and temporary promotions be made in terms of the Rules. The Chief Conservator of Forest forwarded to the Public Service Commission, Uttar Pradesh, a list of twenty-two Forest Rangers for being considered at the selection for eleven permanent posts. He also forwarded a list of fifty-one

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Forest Rangers for being approved for officiating and temporary appointments. The name of the petitioner was included in the second list only. The Public Service Commission recommended the names of twenty Forest Rangers for permanent promotion and of sixty Forest Rangers for officiating and temporary appointments. The contention of the petitioner was that inasmuch as at the time of the preparation of the list by the Chief Conservator of Forest and the Public Service Commission and also when the final selection took place in the year, 1966 the adverse entries which were ultimately ordered to be expunged were still there in his character roll, he was very much prejudiced for no fault of his. There was also danger of his being reverted to the post of Forest Ranger if and when the number of posts which were required to be filled on officiating and temporary basis decreased. Such contingency had, in fact, arisen and an order for the reversion of the petitioner to the post of Forest Ranger had been passed. It was on these allegations that the petitioner had prayed for the reliefs which were ultimately granted, when the writ petition was allowed.

App. 'B' of the Rules deals with the procedure for recruitment by promotion. Para. 1 provides that the selection shall be strictly on merits and will be made from amongst Forest Rangers eligible under the rules for promotion. Para. 2 enumerates the qualities that must be there in the candidates who is approved for promotion, and out of the nine qualities enumerated "(iv) straight forwardness" "(v) dependability", "(vi) integrity", "(viii) effective supervision" and "(ix) efforts to eliminate corruption" were also there. The adverse entry which has been given to the petitioner for the year 1960-61 was bound to cast a good deal of doubt on all the five qualities enumerated above.

Para. 3 of App. 'B' required the Chief Conservator of Forest to draw up a list of most suitable Forest Rangers from amongst those who are eligible for promotion to the service in a particular year. The number in the list was required to be double the number of vacancies which were intended to be filled substantively during the course of the year.

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Paras. 6 and 7 of App. 'B' of the Rules provide for the procedure before the Public Service Commission. The Public Service Commission was required to examine the character rolls of all the Forest Rangers and was empowered to add any new names to the list.

The contention of the petitioner was that in view of the most damaging adverse entry which had been given to him for the year 1960-61—an entry which had been subsequently expunged in its entirety, the Public Service Commission could not have included his name in the list of Forest Rangers fit for confirmation as Assistant Conservators of Forest

Under the Rules the Government was to accept the recommendation made by the Public Service Commission and to make appointments after re-arranging the list according to the original seniority of Forest Rangers.

From what has been stated above it is clear that the entries in the character roll of a Forest Ranger were to play a very important part at both the stages of the selection, that is to say, (1) when the Chief Conservator of Forest prepared the list of approved candidates for submission to the Public Service Commission, and (2) when the Public Service Commission on examination of the character rolls of the Forest Rangers assess-

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ed their suitability for being promoted to the post of Assistant Conservators of Forest

The contention of the petitioner, therefore, was that the authorities concerned did not act fairly. He has no particular grievance against the Public Service Commission because it was bound to consider all those entries in the character roll which existed at the time the character rolls were forwarded to it along with the list prepared by the Chief Conservator of Forest. The contention of the petitioner, however, was that in his case there was no observance of the rules inasmuch as an adverse entry which should not have been there in the character roll—and which had been later expunged in its entirety—was allowed to remain on the record and to prejudice his case both before the Chief Conservator of Forest and the Public Service Commission.

The facts stated above, as found by the learned single Judge after a perusal of the affidavits filed by the parties, have not been disputed before us at the time of the arguments in this special appeal. However, it has been contended by the learned counsel for the appellants that the writ petition should not have been allowed because—

(1) no Government servant can claim promotion as a matter of right;

(2) inasmuch as the adverse entries made in the character roll of the petitioner had existed till the year 1964; both the Chief Conservator of Forest and the Public Service Commission were perfectly justified in making the selection upon the consideration of those entries;

(3) the orders passed by the Government at the time of making the selection were executive orders and should not have been quashed;

(4) no question of natural justice could arise in the circumstances of the case; and

(5) in any case the entire selection should not have been quashed, because if that is done so many other Forest Rangers would suffer for no fault of theirs.

In our opinion there is no force in any of these contentions.

It is true that no Government servant can claim that he should be promoted as of right and according to his seniority, but this is not what the petitioner had claimed. His contention was that the procedure as laid down in App 'B' for recruitment by promotion was not followed, and although he was eligible for being considered for promotion, his case was not considered in its true perspective because of the existence of certain adverse entries which had subsequently been expunged.

So long as those adverse entries existed in the character roll of the petitioner both the Chief Conservator of Forest and the Public Service Commission were bound to consider them. However, after an appeal had been filed by the petitioner against the adverse remarks which had been given to him for the year 1960-61, it was open to the Chief Conservator of Forest to have made a request to the Government to expedite the disposal of the appeal. Either the selection should not have been ordered before the disposal of the petitioner's appeal, or, in case that was not considered to be expedient, a post could have been left vacant for the petitioner so that his case could not be prejudiced in the event the appeal filed by him was ultimately allowed.

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Art. 14 of the Constitution assures every citizen that the State shall not deny to such person equality before the law or the equal protection of the laws within the territory of India. Art. 12 of the Constitution defines 'the State' as including the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Art. 13(3) (a) of the Constitution defines "law" as including any Ordinance, Order, Bye-law, Rule, Regulation, Notification, Custom or Usage having in the territory of India the force of law.

From the definition of the "the State" and "law" as contained in the Constitution it is clear that the protection against discrimination afforded by Art. 14 extends not merely to legislative action but also to executive action in exercise of express statutory powers. PATANJALI SASTRI, C. J. pointed this out in the case of *State of West Bengal v. Anwar Ali* (1), and observed as follows:

"And as the prohibition under the Article directed against the State, which is defined in Art. 12 as including not only the Legislatures but also the Governments in the country, Art. 14 secure all persons within the territories of India against arbitrary laws as well as arbitrary application of laws. This is further made clear by defining 'law' in Art. 13 (which renders void any law which takes away or abridges the rights conferred by Part I as including among other things, any 'order' 'notification', so that even executive orders or notifications must not infringe Art. 14".

(1) A.I.R. 1962 S.C. 75.

Referring to Art 14 of the Constitution S. R. DAS, C. J. observed in the case of *Basheshaj Nath v. Income-tax Commissioner*, (1) that—

“The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws’. There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article, it must be noted first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g. Art 19 do. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.

In the third place it is to be observed that, by virtue of Art 12, ‘the State’ which is, by Art 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Thus Art. 14 protects

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us from both legislative and executive tyranny by way of discrimination."

In the case of *Union of India v. P. K. Roy* (1) it was observed that the extent and application of the doctrine of natural justice cannot be imprisoned within the straight jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.

The Andhra Pradesh High Court in the case of *Poonamalli Ramayya v. The State of Andhra Pradesh* (2) observed that even where an order passed by the Government cannot be strictly called judicial or quasi judicial, there is duty to act fairly

In the case of the petitioner we find that in making the selection of Assistant Conservators of Forest from amongst the Forest Rangers in the year 1964 without keeping one post vacant for the petitioner in case after his appeal had been allowed and he was considered fit for permanent appointment to the post of Assistant Conservator of Forest, there can be no doubt that the Chief Conservator of Forest and the State Government did not act fairly and the petitioner has suffered for no fault of his. In the circumstances of the case there can be no doubt that the rules of natural justice were violated.

The learned counsel for the appellants has relied the following cases in support of his contention that the directions that adverse remarks should be communicated to the employees are merely administrative and have no force of law, and, therefore, where a departmental

(1) A.I.R. 1968 S.C. 880.

(2) A.I.R. 1969 A.P. 21.

motion committee has acted on the basis of the adverse entries in the character rolls which had not been communicated to the employees, their action, unless it was *mala fide*, was not open to challenge:

(a) *B. V. Kanniah Chhetty v. Inspector General of Police* (1).

(b) *Prakash Chand Sharma v. The Oil and Natural Gas Commission* (2).

(c) *State of Rajasthan v. Shri Guman Singh* (3).

In our opinion none of these three cases will apply to the facts of the present case. It was held by the High Court of Mysore in the case of *B. V. Kanniah Chhetty v. Inspector General of Police* (1) that although adverse remarks passed against officers in the confidential reports ought to have been communicated to them, it cannot be said, on the mere circumstance that it had not been so done, that they are fit for promotion. The reason given was that the Government instructions that the adverse remarks should be communicated to the officers concerned is merely an administrative order and has no force of law. It was observed that—

“If an authority has exercised its discretion in good faith and not in violation of any law, such exercise of discretion cannot be interfered with merely on the ground that it could have been exercised differently.”

It was held that there was no violation of Art. 16 of the Constitution as the cases of the petitioners were considered factually on the basis of the existing remarks.

In the case of *Prakash Chand Sharma v. The Oil and Natural Gas Commission* (2) an order passed on the re-

(1) 1967 Service L.R. 615.

(2) 1970 Service L. R. 116.

(3) 1971 Service L.R. 850.

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commendation of departmental promotion committee was challenged on the ground that it was discriminatory. Four Junior Transport Inspectors, who were junior to the petitioner, were appointed Senior Transport Inspectors while the petitioner was not so appointed. Later, on a representation made by the petitioner, he was informed that he had been passed over because of certain adverse entries existing in his confidential reports. It was held that the order could not be said to be discriminatory because the departmental promotion committee could act only on the basis of entries existing in the confidential reports. In the course of the judgment it was observed that although instructions regarding confidential reports (that adverse entries should be communicated to the officers concerned) were not properly observed, but there was no *mala fide* on the part of the departmental promotion committee or anyone else.

In the case of *State of Rajasthan v. Shri Guman Singh* (1) it was held by the High Court of Rajasthan that the power exercised by the departmental promotion committee was executive and not quasi-judicial. The argument, that the recommendations made by the departmental promotion committee were vitiated because the committee did not proceed to communicate all entries in the confidential reports to the petitioner and did not give him an opportunity to get himself cleared, was not accepted.

None of these three cases will apply to the facts of the present case for the simple reason that in none of these three cases the entries made against the petitioner had been expunged and his case had been considered on the basis of entries which must be deemed never

(1) 1971 Service L. R. 350.

have existed in the confidential reports or the character roll. The petitioner does not contend that the Public Service Commission had not considered his case properly. His contention, on the other hand, is that an absolutely incorrect record was both before the Chief Conservator of Forest and Public Service Commission at the time his case was considered, and, therefore, so far as the petitioner was concerned the rules governing the procedure for recruitment by promotion as contained in App. 'B' of the Rules were not properly observed. In the circumstances of the present case there can be no doubt that the rule of natural justice were not discussed.

There is no force in the contention that the entire selection should not have been quashed. In the first place it was necessary because the petitioner cannot get his redress unless the entire selection is quashed. In the second place the selection was not strictly in accordance with the Rules, because, as pointed out by the learned single Judge, twenty names were approved for permanent absorption when a list of only twenty-two names had been drawn for filling up eleven posts only, and in the third place although the Rules required that all the candidates whose names were included in the final list had to be interviewed by the Committee, no interview was held in the case of two Forest Rangers.

The contention of the learned counsel for the appellants that the rule providing for interview of the candidates were merely directory is not borne out from the language of para 7 of App. 'B' to the Rules, which reads as follows:

"The Secretary to Government in the Forest Department shall then in consultation with the Com-

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mission, fix a date and call for interview only those candidates whose names are contained in the final lists drawn up by the Commission. These candidates shall then be interviewed by the Selection Committee ."

It is true that under r. 27 of the Rules the Governor, when satisfied that the operation of any rule regarding the conditions of service of the members of the service causes undue hardship in any particular case, he may, in consultation with the Commission, by order dispense with or relax the requirement of that rule. However, there is nothing on the record to show that any such order was passed by the Governor with regard to para. 7 of App. 'B' at the time when this selection was made in the year 1966.

There is no force in this special appeal, and it is dismissed with costs.

Appeal dismissed

CIVIL MISCELLANEOUS

*Before Mr Justice G C Mathur and Mr Justice
H. N Seth*

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July 21.

HARSH NARAIN *alias* HARSHU AND OTHERS
PETITIONER

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AND ANOTHER

.. RESPONDENT

Constitution of India, Art. 22(4)—U. P. Control of Goona Act, 1970 does not offend Art. 22(4)

The Act is not a law providing for preventive detention and cannot be challenged on the ground of being offensive to Art. 22(4).

U. P. Control of Goondas Act, 1970, ss. 3(3) and 3(1)(a) (b) (c)—*Order under s. 3(3)—District Magistrate to be satisfied as to existence of conditions mentioned in cls. (a) (b) and (c) of s. 3(1).*

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An order under s. 3(3) of the Act cannot validly be made unless the District Magistrate is satisfied as to the existence of each one of the conditions mentioned in cls. (a), (b) and (c) of s. 3(1). Cl. (c) of s. 3(1) of the Act cannot be confined to the non-availability of witnesses in a criminal case pending on the date on which the order is passed by the District Magistrate.

Kamla v. The State of U. P. (1) over-ruled.

——, s. 3(1) (a) (b) and (c)—*Notice—General nature of the material allegations missing—Defect fatal.*

The defect of not setting out the general nature of the material allegations in the notices is a fatal defect as it results in non-compliance with the provisions of s. 3(1). The notices cannot be deemed to be notices under s. 3(1).

Civil Miscellaneous Writ No. 2526 of 1972.

S. C. Khare, S. C. Agarwal, A. P. Singh and G. N. Verma, for the Petitioners.

S. C., for the Respondents.

G. C. MATHUR, J.:—The three petitioners are real brothers. The District Magistrate of Allahabad has passed orders against each one of them under s. 3(3) of the U. P. Control of Goondas Act, 1970, externing them from the district of Allahabad for a period of six months. These externment orders have been challenged by the petitioners. After hearing counsel for the parties, we passed short orders on July 13, 1972, allowing the writ petitions and quashing the externment orders. We now proceed to give our reasons for the order.

The Act was enacted for the purpose of controlling and suppressing *goondas* with a view to the maintenance of public order. S. 2(b) defines 'goonda' thus:—

(1) Writ Petition No. 784 of 1972 decided on 14-7-1972.

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"2. (v) 'Goonda' means a person who—

(i) either by himself or as a member or leader of a gang, habitually commits, or attempts to commit, or abets the commission of, offences punishable under Chap. XVI, Chap. XVII or Chap. XXII of the Indian Penal Code; or

(ii) has been convicted under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice under the U. P. Excise Act, 1910; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community."

Any person, who falls within one or more of the four clauses, will be a *goonda*. S. 3 makes provision regarding the externment, etc. of *goondas*. Sub-s. (1) requires the District Magistrate to give a notice to the person against whom action is proposed to be taken. It reads:

"3. (1) Where it appears to the District Magistrate—

(a) that any person is a *goonda*; and

(b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged, or about to engage, in the district or any part thereof, in

the commission of any offence punishable under Chap XVI, Chap. XVII, or Chap XXII of the Indian Penal Code, or under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or under the U. P. Excise Act, 1910, or in the abetment of any such offence, and

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(c) that witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property;

"The District Magistrate shall, by notice in writing, inform him of the general nature of the material allegations against him in respect of cls. (a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them."

If it appears to the District Magistrate that a person satisfies the requirements of cls (a), (b) and (c) of this sub-section, he shall give him a notice under this sub-section, stating "the general nature of the material allegations" against him in respect of cls (a), (b) and (c). The District Magistrate is then required to give the person a "reasonable opportunity" of giving his explanation regarding the general nature of the material allegations. Sub-s (2) provides for an oral hearing before the District Magistrate in these words:

"3 (2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witnesses that he may wish to produce in support of his ex-

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planation, unless, for reasons to be recorded in writing, the district Magistrate is of opinion that the request is made for the purpose of vexation or delay."

It will be noticed that the person, at this stage, is to be given a "reasonable opportunity" to produce his evidence in support of his explanation. The sub-section does not provide for an opportunity to cross-examine any witnesses, obviously because the proceedings are initiated when there are no witnesses willing to give evidence against the person. The sub-section also does not specifically provide for the disclosure by the District Magistrate of the material or evidence in his possession or for giving an opportunity to the person to meet such material or evidence. After the hearing provided by sub-s (2) is over, the District Magistrate may pass orders under sub-s (3) which provides:—

"3. (3) Thereupon the District Magistrate, on being satisfied that the conditions specified in cls. (a), (b) and (c) of sub-s. (1) exist, may, by order in writing,—

(a) direct him to remove himself outside the district or part, as the case may be, by such route, if any, and within such time as may be specified in the order, and to desist from entering the district or the specified part thereof until the expiry of such period not exceeding six months as may be specified in the order;

(b) (i) require such person to notify his movements, or to report himself, or to do both, in such manner at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order,

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until the expiry of such period, not exceeding six months as may be specified in the order."

In *Raja v State of U. P.* (1), a Division Bench of this Court has held that orders under cls (a) and (b) of sub-s. (3) cannot be passed simultaneously and that, if an order is passed under cl (a), the question of passing any order under cl (b) does not arise.

S 4 of the Act empowers the District Magistrate to grant permission to the externed *goonda* to return temporarily. S. 5 gives power to the District Magistrate to extend the period of externment from time to time up to a maximum of two years in the aggregate. S. 6 provides for an appeal to the Commissioner against the order of the District Magistrate passed under ss. 3, 4, and 5. S. 8 lays down that the District Magistrate or the Commissioner may take into consideration any evidence which he considers to have probative value, and the provisions of the Indian Evidence Act shall not apply. S. 9 empowers the District Magistrate and the Commissioner to rescind any orders made by them. S. 10 provides for punishment for contravention of orders passed under ss. 3, 4, 5 and 6. S. 11 provides for the forcible removal of the externed *goonda* who returns in contravention of the order. S. 15 empowers the State Government to make rules.

In May, 1971, the District Magistrate Allahabad served separate notices under s. 3(1) upon the three petitioners.

(1) 1972 A.W.R. 871.

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The petitioners submitted their explanations. At the hearing, the petitioners examined certain witnesses and produced some documents. On February 5, 1972, the District Magistrate passed separate orders against the three petitioners, externing them from the district of Allahabad for a period of six months. The orders directed the petitioners to leave Allahabad by the Phaphamau-Sahson-Gyanpur route within five days and to desist from entering the district of Allahabad during the period of six months. The petitioners were further directed to notify their movements and to report to the Senior Superintendent of Police, Varanasi, on every Friday. Each one of the petitioners was required to furnish reliable and respectable sureties and personal bonds for carrying out the order of the District Magistrate. Against the orders of the District Magistrate, the petitioners preferred appeals before the Commissioner. By three separate orders dated April 11, 1972, the Commissioner dismissed all the appeals. The petitioners thereupon filed these three writ petitions. The petitions were admitted on April 17, 1972. On the same date, interim orders were passed by this Court, staying the operation of the externment orders on the condition that the petitioners continued to reside within the limits of the Municipal Corporation of Allahabad during the pendency of the writ petitions. The writ petitions came up for hearing before a learned single Judge on July 5, 1972. He referred the Writ petitions for decision to a larger Bench. That is how these writ petitions came up for hearing before this Bench.

Sri S. C. Khare, learned counsel for the petitioners, has challenged the constitutionality of the Act. In *Raja v. State of U P.* (1) the attack on this Act on the ground of violation of Art 19 of the Constitution was repelled and the Act was held to be valid. In view of this decision, Sri Khare has not addressed any argument in respect of Art. 19 but he has contended that the Act con-

travenes the provisions of Art 22(4) of the Constitution. Art 22(4) is concerned with "law providing for preventive detention" and says that no such law shall authorise the detention of a person for a longer period than three months unless an Advisory Board has reported, before the expiration of the said period of three months, that there is in its opinion sufficient cause for such detention. It is urged that externment under the Act amounts to preventive detention and, since the Act provides for externment for more than three months without making a provision for an Advisory Board, it offends Art 22(4) of the Constitution. We are unable to agree with his contention. Externment as a preventive measure cannot be equated with preventive detention. Detention means confinement within a restricted area or space while externment means exclusion from a specified area. In *A K Gopalan v State of Madras* (1) the Supreme Court held that a law relating to preventive detention could not be said to infringe the freedom guaranteed by Art 19. But a law providing for preventive externment does restrict some of the fundamental rights guaranteed by Art 19. The restrictions imposed by the Act on the rights guaranteed by Art 19 have been held in *Raja v State of U. P.* (2) to be reasonable in the interest of the general public and the Act has been held to be protected by Art 19(5). In our opinion, the Act is not a law providing for preventive detention and cannot be challenged on the ground of being offensive to Art 22(4). In *Hari Khemu Gawali v Deputy Commissioner of Police, Bombay* (3) s 57 of the Bombay Police Act, 1951, providing for externment was challenged before the Supreme Court, *inter alia* on the ground that the restrictions imposed by the provisions on the freedom guaranteed by Art 19 were not reasonable as s 57 did not provide for an Advisory Board. This contention was repelled by the Supreme Court. It said:

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(1) A I R 1950 S C 27

(2) 1972 A W R. 371

(3) A I R 1956 S C. 559

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"It was next contended that unlike preventive detention laws there was no provision in the impugned law for an Advisory Board which could scrutinise the material on which the officers or authorities contemplated by s 57 had taken action against a person. It cannot be, and has not been laid down, as a universal rule that unless there is a provision for such an Advisory Board such a legislation would necessarily be condemned as unconstitutional.

The very fact that the Constitution in Art 22(4) has made specific provision for an Advisory Board consisting of persons of stated qualifications with reference to the law for Preventive Detention, but has made no such specific provision in Art 19 would answer this contention "

The petitioners' attack on the constitutionality of the Act must fail.

The next contention of Sri *Khare* is that the externment orders are invalid as the condition precedent set out in cl. (c) of s. 3(1) is not satisfied. There is no doubt that an order under s. 3(3) cannot validly be made unless the District Magistrate is satisfied as to the existence of each one of the conditions mentioned in cls (a), (b) and (c) of s. 3(1). The condition mentioned in cl. (c) is that "witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property". It is urged that, in order to fulfil this condition, there must be a criminal case pending against the person and the witnesses should be unwilling to come forward to give evidence in that case. Reliance is placed upon a decision of HARI SWARUP, J. in *Kamla v. The State of U P.* (1). Referring to cl. (c) of s 3(1), HARI SWARUP, J observed:

(1) Writ petition no 784 of 1972 decided on 14-4-1972

"There is no finding by the District Magistrate or by the Commissioner that any criminal case was pending against the petitioner in which the witnesses were not willing to come forward to give evidence against him. There is also no allegation in the counter-affidavit to that effect. As that is a necessary pre-condition for taking any action under s. 3(3) of the Act, the absence of any finding to that effect is fatal to the order."

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We regret our inability to agree with this view. The object of the Act and its other provisions indicate that cl (c) cannot be confined to the non-availability of witnesses in a criminal case pending on the date on which the order is passed by the District Magistrate. If such a restricted meaning is given to cl (c), then the operation of the Act will be limited to a very few cases and its object would be defeated. Two examples will illustrate this : Consider a case where the District Magistrate is satisfied that a *goonda* is about to commit an offence of the kind mentioned in cl (b) (ii) of s 3(1) and is also satisfied that preventive action under the Code of Criminal Procedure cannot be taken against him as witnesses are not willing to come forward and that, for the same reason, it will not be possible to successfully prosecute him after he has committed the offence. If, at that time, there is no criminal case pending against the *goonda* the District Magistrate would not be able to take action against him under the Act if the view contended for by *Sri Khare* is accepted. This would frustrate the very object of the Act. The Act is meant to cover precisely this type of cases. Take another example. The District Magistrate is satisfied that the acts of a *goonda* are causing alarm and danger to persons and their property. There is also a case pending against him in which witnesses are not coming forward to give evidence against

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him for the reasons mentioned in cl (c). The District Magistrate gives him a notice under s 3(1). Before the order under s 3(3) is passed, the *goonda* is acquitted in the criminal case on account of the refusal of the witnesses to come forward to depose against him. The acquittal makes the *goonda* more vicious. If the restricted interpretation of cl (c) is accepted, then the District Magistrate will now be powerless to pass an order under s 3(3). This surely was not intention of the Legislature.

In our opinion, the Legislature contemplated the taking of action under the Act against a *goonda* if his movements or acts are causing or are calculated to cause alarm, danger or harm to persons or property or, if he was about to commit or abet the commission of an offence mentioned in s 3(1) (b) (ii) when the District Magistrate was satisfied that it would not be possible to take preventive action against him under the normal law (Code of Criminal Procedure) or punitive action under the Indian Penal Code or under the Suppression of Immoral Traffic in Women and Girls Act or under the U.P. Excise Act for the reason that witnesses would not be coming forward to depose against him on account of fear for the safety of their person or property. The provisions of the Act are intended to prevent further mischief by a *goonda* and not to secure his conviction in a pending case. We have, therefore, come to the conclusion that it is not necessary for fulfilment of the condition mentioned in cl (c) of s 3(1) that there should be a criminal case pending against the *goonda* on the date on which the District Magistrate takes action against him. It is sufficient if the District Magistrate is satisfied that generally witnesses are not willing, for the reasons mentioned in cl. (c), to give evidence against the *goonda* either to sustain preventive action under the Code of Criminal Procedure or a prosecution under the Indian Penal Code or under the Suppression of Immoral Traffic in Women and Girls Act.

or under the U.P. Excise Act. Such preventive action or prosecution need not be pending on the date on which action is taken under the Act. The satisfaction of the District Magistrate can legitimately be based upon the past or present experience relating to the *goonda* or upon both. In this view, even if no criminal cases were pending against the petitioners on the date on which the impugned orders were passed, that fact would not vitiate the satisfaction of the District Magistrate regarding the existence of the condition set out in cl. (c) of s. 3(1).

The last contention raised by Sri *Khare* is that there was no relevant material or evidence before the District Magistrate on which his satisfaction as to the existence of the three conditions mentioned in cls. (a), (b) and (c) of sec. 3(1) could be based. He has also contended that the Act requires the objective, and not the subjective, satisfaction of the District Magistrate as to the existence of the three conditions. He relied on the fact that the Act lays down objective standards in respect of the three conditions and, on the difference in the language of sub-s. (3) which requires the District Magistrate to be "satisfied as to the existence of the conditions" and the language of sub-s. (1) which uses the words "when it appears to him." The satisfaction being objective, it is said, it is open to this Court examine the evidence and to see whether there was any relevant legal evidence to support the satisfaction of the District Magistrate. He has further contended that, even if the satisfaction of the District Magistrate is merely subjective, this Court can still see whether there is any relevant evidence or material in support of it. On the other hand, the learned Advocate General has submitted that, keeping in mind the facts that the action to be taken is preventive, that only the general nature of the material allegations are to be disclosed, that the opportunity to be given is only in respect of the general nature of the material allegations,

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that the District Magistrate is not required to disclose all or any of the material or evidence on which he relies and that the satisfaction for taking such preventive action is usually in the realm of suspicion and not proof, the satisfaction cannot but be held to be subjective and not objective. We do not feel called upon to decide these questions to these cases for the reason that the stage of the satisfaction of the District Magistrate, whether it be objective or subjective, was not legally and properly reached.

Notices under s. 3(1) were served by the District Magistrate on each of the petitioners. The U P. Control of Goondas Rules, 1970, set out in the schedule, the form in which the notice under s. 3(1) is to be given. The opening part of the notice recites in paras (a), (b) and (c) that the conditions mentioned in cls (a) (b) and (c) of s. 3(1) appear to the District Magistrate to exist. The notices given to the petitioners are in the prescribed form. In the opening part of each notice it is stated that it appeared to the District Magistrate that the petitioners were *goondas* [satisfying the requirements of s. 2(b)(i) and (iv)] that their movements and acts were causing or were calculated to cause alarm, danger or harm to persons or property and that witnesses were not willing to come forward to give evidence against them by reason of apprehension on their part as regards the safety of their person or property. After the opening part, the prescribed form states :

“And whereas the material allegations against him in respect of the aforesaid cls (a)/(b)/(c) are of the following general nature :

- (1) _____
- (2) _____
- (3) _____

In each of the notices given to the petitioners, in this blank space, instead of setting out the general nature of the material allegations against each one of the petitioners is given a list of First Information Reports filed against each petitioner in the last several years and references of cases in which they were convicted. The learned Advocate General has frankly and fairly accepted that the notices in the present cases do not set out the general nature of the material allegations against the petitioners. He argued that this defect in the notices did not handicap the petitioners in making their representations. In our opinion, the defect of not setting out the general nature of the material allegations in the notices is a fatal defect as it results in non-compliance with the provisions of s. 3(1). The notices cannot be deemed to be notice under s. 3(1). S. 3(1) enjoins upon the District Magistrate to inform the *goonda* of the general nature of the material allegations against him in respect of cls. (a), (b) and (c) and further enjoins upon to give the *goonda* a reasonable opportunity of furnishing his explanation regarding them. If the *goonda* is not informed of the general nature of the material allegations regarding cls. (a), (b) and (c), he can furnish no explanation in respect of them and would be deprived of the reasonable opportunity to which he is entitled under s. 3(1). Not only this, in the absence of a proper explanation, he would also be deprived of the reasonable opportunity under sub-s. (2) of producing his evidence in support of his explanation. When he is deprived of the reasonable opportunity at both these stages, the action taken must be held to be illegal. Where a statute permits the executive to pass orders imposing restrictions on the fundamental rights of the citizens guaranteed by Art. 19 of the Constitution, then such orders can be passed only after strictly complying with the provisions of the statute. If orders are passed without strictly complying with the provisions of the statute, they must be

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struck down For these reasons, we think that the notices issued to the petitioners were illegal, not having been issued in accordance with the provisions of s 3(1) and the subsequent action taken on the basis of these notices must fall with the notices The orders of externment passed by the District Magistrate and the appellate orders of the Commissioner confirming them deserve to be quashed.

We accordingly allow the writ petitions and quash the orders of externment passed by the District Magistrate against the petitioners as well as the orders of the Commissioner upholding these orders. In the circumstances of these cases, there will be no order as to costs.

Writ Petitions Allowed

APPELLATE CIVIL

Before Mr. Justice A K Kirtly and Mr. Justice Gopi Nath
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August, 8. PLAREY LAL *alias* BUDH SAIN AND ANOTHER
Respondents.

India Contract Act, 1872, s. 55—Agreement to reconvey immovable property—Definite period fixed in the agreement—Time is essence of contract—Plaintiff to strictly comply with the conditions of contract.

In the case of an agreement to reconvey, the original vendee acquires under the original sale-deed from the original vendor a precarious title, in the sense that by agreement to reconvey the same he undertakes a risk and uncertainty of acquiring an absolute and indefeasible title. As such, if in the agreement of reconveyance a definite time is fixed, that time would be of the essence of the contract, and a court of equity, except in cases of unavoidable accident, fraud, misrepresentation etc. will not give any equitable relief to the plaintiff, if it is established that he failed to strictly abide by the specific conditions subject to which the agreement of reconveyance was executed.

Transfer of Property Act, 1882, s. 54—Vendee under an agreement, to reconvey can transfer the property—Sale not illegal.

A vendee under an agreement to reconvey the property to his original vendor within a certain time is not legally prevented from transferring the property. If a person is ready and willing, with full notice of such agreement to purchase the property in question and to acquire such title and interest in the property as the original vendee was capable of transferring, it can not be said that he enters into a transaction which is illegal or void.

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Indian Limitation Act, 1908, Art 113—*Period of three years to be computed from the date fixed under the agreement.*

The period of three years under Art 113 is to be computed from the date fixed for the performance of a contract or if no such date was fixed, when the plaintiff had notice that such performance was refused.

First Appeal No. 259 of 1965 from the judgment and decree of K. K. Birla, Addl Civil Judge, Saharanpur, dated 2nd March, 1965 in Original Suit No. 14 of 1964.

K. C. Saxena for the Appellant

A K KIRTY, J.:—This appeal is directed against the decree passed by the learned Additional Civil Judge, Saharanpur, dismissing the suit filed by the appellant against the two respondents for specific performance of the contract to re-convey a house along with some land which the appellant had sold to respondent No. 1 for Rs. 25,000 by a sale deed dated 12-12-1958. On that very date two other documents were executed. One was an agreement for the re-conveyance of the property in question to the appellant by respondent no. 1. The other document was a rent-note executed by the appellant in favour of respondent No. 1 agreeing to pay rent at the rate of Rs. 250 per month for the property in question. Respondent no. 2 is a transferee from respondent no. 1. On 21st January 1959 respondent no. 1 transferred the property which he had purchased from the appellant for the same consideration of Rs. 25,000. In the plaint the appellant pray-

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ed that a decree for specific performance of the agreement to re-convey be passed either against defendant no. 1, i.e. the present respondent no. 1, or against the two defendants or against any one of them who may be found by the court to be liable to perform the contract. The suit was contested by defendant no. 2 only. Defendant no. 1, namely, Piarey Lal *alias* Budh Sain does not appear to have entered appearance. No written statement was filed by him. The trial court, on the pleadings of the parties, framed in all eight issues. Issues numbered 1, 2 and 3 related to a question which had arisen as to whether the transfer in favour of defendant no. 1 by the plaintiff made on 12th December, 1958 was a mortgage by conditional sale or it was an out-and-out sale. Here it may be mentioned that in the plaint the plaintiff had set up an alternative case that the transaction was a mortgage by conditional sale, and he had also sought an alternative relief by way of redemption. The suit was decided by the trial court against the plaintiff and the relief for redemption was also refused. The learned counsel for the appellant rightly conceded that the plea that the transaction was a mortgage by conditional sale was not tenable. Similarly issue no. 6 was also an issue dealing with a question incidental to the main question whether the transaction was a mortgage by conditional sale. The remaining issues are as follows:

(3) Whether defendant no. 2 is bound by the agreement dated 12th December, 1958 between the plaintiff and defendant no. 1 as alleged in para 19 of the plaint? If so, its effect?

(5) Whether defendants nos. 1 and 2 are to re-sell the property in favour of the plaintiff? If so, on payment of what amount?

(7) Plaintiff's relief, if any?

(8) Whether the suit is barred by time?

These issues were also answered against the plaintiff and it was held that the plaintiff had no right to any of the reliefs claimed by him. The suit was, therefore, dismissed *in toto*.

As has already been mentioned, on 12th December, 1958 three documents were executed. In this appeal we are not really concerned with the rent-note, nor are we directly concerned with the sale-deed dated 12th December, 1958. The questions which directly arise and which require consideration are as follows :

(1) Whether under the agreement dated 12th December, 1958, Ext 2, time was of the essence of the contract ?

(2) Whether the subsequent sale by defendant no. 1 in favour of defendant no. 2 on 21st January, 1959 had the effect of repudiating the agreement to reconvey the property to the plaintiff by defendant no. 1 ?

(3) Whether the suit was barred by limitation ?

(4) Whether it was necessary for the plaintiff-appellant to prove that he was ready and willing to perform his part of the agreement or that he had called upon the defendants or defendant no. 1, at any rate, to re-convey the property within the stipulated period of two years ?

Before proceeding to consider the above questions, we may mention that the trial court has found as a fact that the plaintiff did not within a period of two years from 12th December, 1958 make any attempt nor offered to pay the amount of Rs 25,000 to the defendants or either of them. Here we may note that the trial court has also recorded a finding to the effect that defendant no. 2 had never extended the period of two years mentioned in the agreement dated 12th December, 1958 ; and another finding that defendant no. 2 is bound by the agreement dated 12th December, 1958 between the plaintiff and de-

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defendant no 1 The finding that defendant no 2 was bound by the agreement executed by defendant no 1 in favour of the plaintiff to re-convey the property has not been assailed before us by the learned counsel appearing for respondent no 2 Learned counsel for the appellant did not also directly challenge this finding, but in the course of argument submitted that defendant no. 2 was not a privy to the said agreement and, therefore, the plaintiff had no legal right to demand performance of the agreement from defendant no. 2.

Sri K.C Saxena, learned counsel for the appellant challenged the finding of the trial court that the plaintiff had not within the stipulated period of two years offered to defendant no. 1 or defendant no 2 to perform his part of the contract, nor tendered or offered to tender the requisite sum of Rs.25,000 The material evidence on the point to which our attention was invited consists of the oral testimony of the plaintiff himself and that of Premnath Bhatia (P W 2) who at the relevant time, was, according to the plaintiff and the witness himself, the plaintiff's manager Besides this oral testimony, there is only one other document on the record, namely, Ex. 6 dated 17th January, 1961 which possibly may have some bearing on the matter. Ex. 6 is the reply given on behalf of defendant no. 2 to a notice dated 4th January, 1961 which the plaintiff had given to defendant no 2. The plaintiff did not summon the original notice dated 4th January, 1961 from defendant no. 2 nor did he produce any copy thereof as secondary evidence. Therefore we do not know what allegations had, in fact, been made in that notice dated 4th January, 1961. Para 3 of Ex 6, however, suggests that in the notice dated 4th January, 1961 an allegation was made that prior to the giving of the notice either the plaintiff himself or some other person on his behalf had approached defendant no. 2 with the demand for the reconveyance of the property on payment of Rs.25,000. The said para. 3 reads :

"That it is denied that you or any person on your behalf ever approached or visited my client or that my client ever held out any promise to resell the property to you. The allegations made in the notice in this respect are totally baseless and false."

DR. N. M. S.
MOHAN LAL
PRASAD LAL
alias
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It is clear, therefore, that even if there was some allegation in the notice dated 4th January, 1961 about the plaintiff or his agent approaching defendant no. 2, that allegation was categorically denied. In the plaint it was averred (vide para. 22) that towards the end of November, 1960, the plaintiff had sent his representative to defendant no. 2 for the purpose of getting the property re-conveyed on payment of the requisite sum, but defendant no. 2 said that he would have no time in December, and that the plaintiff's representative should come in January with the requisite sum and that then the deed of re-conveyance would be executed with the concurrence and assistance of defendant no. 1. It was also alleged in the plaint that defendant no. 2 had assured the plaintiff's representative that no question of limitation would really arise. It was further alleged in the plaint (vide para 23) that on such assurance being given by defendant no. 2, the plaintiff's representative went to defendant no. 1 in the beginning of December, 1960 and intimated the said defendant about the allegations contained in para 19 of the plaint and also about his visit to defendant no. 2. Defendant no. 1, it was alleged in the plaint, assured the plaintiff's representative that there was nothing to worry about and that the property would be re-conveyed and that there would be no question of limitation. It was also alleged in the plaint that defendant no. 1 asked the plaintiff's representative to come to him before going to defendant no. 2 again, as asked by the latter, in the month of January for obtaining the deed of re-conveyance, and that defendant no. 1 would also accompany the plaintiff's representative and get the necessary deed of re-conveyance executed. In evidence,

107) however, a departure was made by the plaintiff himself as also by his manager. The court below pointed out that there was substantial variation between the oral testimony of the plaintiff's witnesses and the averments made in the plaint. This was stated to be one of the reasons for not treating the plaintiff's witnesses as reliable. After hearing the learned counsel for the parties and after considering the relevant portions of the evidence of the plaintiff's witnesses, we are in full agreement with the view taken by the trial court. There is also some inherent improbability in the version given by the plaintiff as regards sending his manager to defendant no. 2 in November and to defendant no. 1 in December 1960. Had it been a fact that the said Manager had visited defendant no. 1 and defendant no. 2 both and they had given certain assurances in regard to the execution of the deed of re-conveyance, there appears to exist no reason why the plaintiff did not either go personally to the defendants or, at any rate, send his manager to them in January next with the requisite money for getting the deed of re-conveyance executed. In their depositions the plaintiff's witnesses have made no mention of any such visit in the month of January to either of the defendants. On the contrary, it seems that on 4th January, 1961 a notice was given by the plaintiff to both the defendants. The giving of the notice itself without making a second visit to the defendants suggests that the version given by the plaintiff about sending his manager to defendant no. 2 in November 1960 and to defendant no. 1 in December, 1960 is not true. The finding given by the trial court that prior to sending the notice dated 4th January, 1961 the plaintiff did not approach either of the defendants for getting the deed of re-conveyance executed on payment of the requisite sum must therefore be affirmed.

Sri K. C. Saxena, however, urged that the aforesaid finding could not in any way affect the legal rights of the

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plaintiff under the agreement of re-conveyance dated 12th December, 1958. It was contended firstly, that the time was not of the essence of the contract and secondly, that even though in that agreement, a period of two years was mentioned that did not necessarily mean that after the expiry of the said period, the plaintiff ceased to have any right to get the property re-conveyed. In support of this contention the learned counsel placed reliance on a number of reported decisions. Before considering these decisions we may here mention another argument of the learned counsel in this connection. It was submitted that admittedly defendant no. 1 had sold the house to defendant no. 2 by a sale-deed dated 21st January, 1959. This second sale-deed is on the record, of which the paper number is 19-C. It was contended that this act of selling the property in question by defendant no. 1 to defendant no. 2 by itself constituted in law an act of repudiation of the agreement to reconvey the property and that, therefore, it was not legally necessary for the plaintiff to offer payment of Rs. 25,000 to defendant no. 1 in order to obtain the deed of re-conveyance, nor was it necessary for him to make a demand from either of the defendants for getting the necessary deed of re-conveyance executed. We shall deal with these arguments after we have dealt with the first question, namely, whether time was of the essence of the contract.

The learned counsel besides placing reliance on some reported decisions, which we shall presently consider, also relied on the provisions of s. 55 of the Contract Act. It is true that ordinarily time may not be of the essence of the contract in an agreement to sell immovable property, but there is no law, to our knowledge, which provides that in no case shall time be of the essence of the contract to sell immoveable property, even though in the agreement itself a definite time is fixed. Apart from

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that, there appears to exist some fundamental difference between an agreement to sell property and an agreement to re-convey a property sold. In a sense, it is true that they are both agreements; but as has been pointed out in a number of cases and by the Supreme Court itself in *K Simrathmull v. Nanjalinguiah Gowder* (1) a contract to reconvey is in reality a concession made by the vendee to the vendor. In some cases it has been described to be in the nature of a privilege. The Supreme Court quoted with approval a passage from Halsbury's Laws of England which we may ourselves profitably reproduce.

"Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner or at a stated time, the act must be performed accordingly.. .."

The Supreme Court affirmed the majority view of the Federal Court in *Shanmugam Pillai v. Annalakshmi Ammal* (2) where it was held that if an option under an agreement is reserved to a vendor for repurchasing the property sold by him, the option is in the nature of a concession or privilege and may be exercised on strict fulfilment of the conditions, on the fulfilment of which it is made exercisable; and that if the original vendor fails to act punctually according to the terms of the contract, the right to repurchase will be lost and cannot be specifically enforced. In view of the clear enunciation of the legal principles applicable to agreements to re-convey property, including immoveable property, it seems hardly necessary to refer to or discuss other cases which do not directly deal with the question. Even so, we consider it desirable to refer to certain cases on which reliance was placed by Sri Savena. Before advertent to the said cases we may, however, refer to a Division Bench decision of this Court in *Roshan v. Mahabir Prasad* (3)

(1) A.I.R. 1969 S.C. 1182.

(2) A.I.R. 1950 F.C. 88.

(3) 8 D. L. R. 176.

in which also this Court considered the legal incidents of and the rights of the original vendor under an agreement to reconvey a property. The trial court has relied on this decision. In our view, this case also fully supports the contention of the contesting defendant that time was of the essence of the contract and that the right which the plaintiff possessed under the agreement was in the nature of a concession or privilege. Of the cases cited by *Sri Saxena* on the question, the one which deserves particular mention is *Gamathinayagam Pillai v. Palani-swami Nadar* (1). This case did not relate to an agreement or reconveyance. It appears that in that case appellants 1 and 2 had agreed to sell some land to the plaintiff-responding. Originally no time was fixed for the completion of the sale. Subsequently, however, appellants 1 and 2, to whom some payments were made by the plaintiff-respondent in advance, agreed in writing stipulating that the sale-deed will be executed on or before April 15, 1959. Thereafter some controversy arose between appellants 1 and 2 and the plaintiff-respondent. The sale-deed was not executed within the stipulated time. Appellants 1 and 2 then filed a suit for specific performance of the contract. One of the pleas taken in defence was that time was of the essence of the contract and that since the plaintiff himself had failed to obtain a sale-deed within the stipulated time he was not entitled to any relief. Therefore, one of the questions which arose for consideration was whether time was of the essence of the contract. In dealing with this question, the Supreme Court referred to s 55 of the Contract Act and observed as follows (vide para 4).

“Intention to make time of the essence if expressed in writing, must be in language which is unmistakable; It may also be inferred from the nature of the property agreed to be sold, conduct of the

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parties and the surrounding circumstances on or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out contract within the specific period, if having regard to the express stipulation of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immoveable it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence."

The aforesaid observations made with reference to an agreement to sell immoveable property and in the circumstances mentioned in the judgment cannot be aptly applied to a case of agreement to re-convey immoveable property where the parties to the agreement themselves have fixed a definite period. The reasons why the two agreements cannot be equated or placed on a parity have been mentioned in some English cases to which reference has been made in *K. Sirathumull's case* (1) and *Roshan's Case* (2). In the case of a contract simpliciter to sell a property, the owner of the property agreeing to sell normally possesses an absolute and perfect title to the property and he agrees to convey or pass on that title to the promisee. In the case of an agreement to re-convey, however, the original vendee acquires under the original sale-deed from the original vendor a precarious title, in the sense that by agreeing to re-convey the same he undertakes a risk and uncertainty of acquiring an absolute and indefeasible title. It would, therefore, be inequitable under such circumstances to hold that even

(1) A.I.R. 1963 S.C. 1182.

(2) 6 D. L. R. 176

though in the agreement of re-conveyance a definite time is fixed that time would not be of the essence of the contract. Nor in our opinion in such a case the court of equity, except in cases of unavoidable accident, fraud, misrepresentation etc., will give any equitable relief to the plaintiff, if it is established that he failed to strictly abide by the specific conditions subject to which the agreement of re-conveyance was executed. Sri Saxena also relied on '*Caltex (India) Ltd. v. Bhagwan Devi Marodia*' (1) and '*Satya Narayana v. Yelloji Rao*' (2). The first case related to a lease which contained a term for renewal for a further period at the option of the lessee. It was held that the optional right given to the lessee was a privilege which could be exercised only upon a strict fulfilment of the conditions subject to which such privilege could be enjoyed by him. Such a person was not entitled to claim any equitable relief if he failed to act in accordance with the material conditions. This case far from supporting the appellant supports, in our opinion, the contentions of the contesting respondent. In para. 6 of the judgment, it was indeed held:

"In the present case, the lease fixes a time within which the application for renewal is to be made. The time so fixed is of the essence of the bargain. The tenant loses his right unless he makes the application within the stipulated time. Equity will not relieve the tenant from the consequences of his own neglect which could be avoided with reasonable diligence".

In *Satya Narayana's* case (2) the main question of law for decision was whether mere delay on the part of the plaintiff to institute a suit for specific performance of a contract for sale of immovable property would be

(1) A.I.R. 1969 S.C. 405.

(2) A.I.R. 1965 S.C. 1405.

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sufficient to disentitle him to the grant of an equitable relief under s. 22 of the Specific Relief Act, 1877, even though the suit was instituted within the period of limitation prescribed by Art. 113 of the Limitation Act, 1908. It was answered in the negative. With respect, we may say that it was very aptly observed by the learned Judges:

‘If the suit is within time, the delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises’.

This question does not really arise in the instant case. The other question was whether on the facts and in the circumstances of the case, the plaintiff whose suit was within limitation should in equity be granted the relief sought. The Supreme Court was satisfied that except for some delay there were no circumstances which should induce a court to refuse in the its discretion to give a relief of specific performance. In our opinion, no question of exercise of discretion arises here since the plaintiff had ceased to possess any subsisting right.

We, therefore, hold that time was of the essence of the contract and that the plaintiff having failed to perform his part under the contract within the stipulated time had no legal right to get the property re-conveyed or to get a decree for a specific performance in that behalf.

As already pointed out, Sri *Saxena* realising the difficulty in the way of the appellant advanced an argument that in the instant case admittedly the property was sold by defendant no. 1 to defendant no. 2 on 21-1-1959; and that this act on the part of defendant no. 1 constituted a clear repudiation of the contract of re-conveyance. Therefore, according to the learned counsel, the plain-

tiff was relieved from the obligation to perform his part of the contract within the stipulated period, but he thereby did not lose his rights under the agreement. Repudiation of a contract may be express; it may also be implied; and it can be inferred from material facts and circumstances as to whether there has or has not been a repudiation of the contract. The mere fact that a vendee has agreed to re-convey the property to the original vendor within a certain time does not legally prevent him from transferring the property. It is true that under the sale from the vendor he has acquired a precarious title which may be defeated at the instance of the vendor provided the vendor fulfils certain terms and conditions agreed to by the parties. If a person is ready and willing, with full notice of such agreement to re-convey the property, to purchase the property in question and to acquire such title and interest in the property as the original vendee was capable of transferring, it cannot be said that he enters into a transaction which is illegal or void. If he steps into the shoes of the original vendee then whatever rights or remedies the original vendor had against the original vendee would be available as against the subsequent transferee also. This would be so because from the admitted or established facts and material circumstances it can be inferred, in the absence of any express contract to that effect that necessarily there was an implied contract by the subsequent transferee to abide by or to carry out the obligation of his vendor under the agreement of re-conveyance which the latter had executed in favour of the person from whom he had himself purchased the property. In the instant case in the sale-deed dated 21-1-1950 (Paper no. 10-C) it is clearly recited that defendant no. 1 had purchased the property from the plaintiff under a sale-deed dated 12th December, 1958 and

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had on that very date executed a separate agreement to reconvey the same to the plaintiff on certain terms and conditions. Clearly, therefore, defendant no. 2 had voluntarily purchased the property with the full knowledge of the agreement and the obligations of defendant no. 1 under the agreement. The sale-deed dated 21st January, 1959 itself provides as follows:

"Ab mushtari is jaidad movaiya ka meri tareh malik kamil swami wa adhikari ho gaya hai aur jo iqrarnama mazkoora bala morkha 12 December san 1958 iswi main ne bahaq Diwan Man Mohan Lal mazkoor tahreer kar diya huwa hai. Is iqrarnama ki sharayat ka mushtari paband rahega."

Thus defendant no. 2 not only had express notice of the agreement to reconvey the property but expressly undertook to be bound down by the same. It thus appears, to us that here it is not a case of any repudiation of the agreement by defendant no. 1. On the contrary defendant no. 1 sold the property subject to that very agreement itself. The question whether there has or has not been a repudiation of a contract is not a pure question of law. It may not be a pure question of fact either. But it would, at any rate, be a mixed question of fact and law. In our opinion, in the instant case, there was no repudiation of the agreement executed in plaintiff's favour by defendant no. 1 nor had the latter by selling the property to defendant no. 2 rendered the reconveyance of the property to the plaintiff an impossibility. Further we may also mention that in the plaint itself it was alleged by the plaintiff that when his representative visited defendant no. 2 he did not refuse to abide by the agreement nor did defendant no. 1 do so when such representative visited him in December, 1960. On the contrary, according to the plaint averment, defendant no. 1 assured plaintiff's representative that the

plaintiff need not worry about limitation, that in January plaintiff's representative should come to him so that he may also accompany the representative during his visit to defendant no. 2 and that defendant no. 1 would get the necessary deed executed. Thus it would appear that in the plaint itself there was no averment in regard to repudiation of the contract within a period of two years. Although we have held that certain averments in the plaint are not true, even so those averments go to show that the plaintiff did not allege that there was any repudiation of the contract which relieved him of the obligation to perform his part of the contract.

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The learned counsel on the question of repudiation placed strong reliance on a Division Bench decision of the Madras High Court in *Kincha Ramakrishnayya v. Kondamudi Sreeramulu* (1). In that case there was an agreement under which some property was agreed to be sold by the plaintiff to the defendants for a certain sum. At the time of the agreement the property was in the possession and enjoyment of a lessee and it was stipulated that possession would be given to the vendee on the expiry of the term of that lease. The sale transaction was not completed for about a year. Meanwhile, it seems, the plaintiff on the expiry of the earlier lease executed a fresh lease. Ultimately the defendants refused to purchase the property. The plaintiff then filed a suit for specific performance of the contract under which the defendants had agreed to purchase the property. One of the points raised by way of defence was that the plaintiff by executing a lease had repudiated the agreement and the defendants, therefore, were no longer bound by the agreement nor could the agreement be specifically enforced against them. The learned Judge of the Madras High Court held that there had been no repudiation or abandonment of the contract

(1) A.I.R. 1939 Mad. 547.

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by the plaintiff, nor did he commit any breach of the terms thereof or do anything in consequence of which he must necessarily be held to have incapacitated himself from discharging his obligation under the contract. The decree of the trial court was set aside and the case was remanded for trial on certain other issues on merits. In view of the finding given in that case that there was no repudiation or abandonment of the contract we do not consider it necessary to refer to certain other observations made by the learned Judges. This case certainly is not an authority for the proposition that merely because defendant no. 1 in the instant case had sold the house to defendant no. 2 there came about a repudiation or abandonment of the contract. We have already mentioned that to our mind such a question is not a pure question of law. It has to be decided in every case, having regard to the facts and circumstances of that case, whether there was or was not any such repudiation of the contract as would relieve a party to a contract from performing acts which the contract itself requires him to do. The learned counsel also relied on two Supreme Court decisions in this connection. They are *International Contractors Ltd. v. Prasanta Kumar Sur* (1) and *Durga Prasad v. Deep Chand* (2). In the first case it was held that in a case of a sale with an agreement to reconvey, if the vendor makes an offer to repurchase and the purchaser repudiates the agreement of reconveyance, formal tender of price by the vendor is not necessary. On 4th February, 1941 some property was sold by the respondent to the appellant. On 10th February, 1941 there was an agreement between the parties for reconveyance within a period ending 10th February, 1943. On 26th February, 1942 the respondent's Solicitor conveyed to the appellant that the respondent was ready and willing to have the purchase completed as early as

(1) A.I.R. 1962 S.C. 77.

(2) A.I.R. 1954 S.C. 75.

possible on payment of the requisite amount. Along with this letter a draft conveyance was sent for appellant's approval. Thereafter some more letters appear to have been written. On 18th December, however, the appellant's solicitor sent a letter stating therein that his client, viz., the appellant, denied that there was any concluded or valid agreement for sale with the respondent or with any other person. By this letter no doubt the contract was expressly repudiated. It was in that situation that the Supreme Court held that it was not necessary for the respondent thereafter to actually tender the requisite amount. This case, therefore, cannot afford any guidance for the decision of the points arising in instant appeal, nor in this case has any such legal principle been laid down as can be applied to the instant case. In the second case, namely, *Durga Prasad v. Deep Chand* (1), the Supreme Court in reality (in para. 40 of the judgment) was considering the form of the decree which should be passed in a suit for specific performance of a contract for sale where prior to the institution of the suit the property was sold by the original purchaser to another person. In considering this matter, the Supreme Court made certain observations of which benefit is sought to be taken on appellant's behalf by his learned counsel. Learned counsel referred to, in particular, para. 40 of the judgment. We have carefully read that paragraph but we do not see therein anything from which it can be spelled out that in a case where the original purchaser has sold the property to another person he necessarily has rendered himself completely incapable of performing his obligation under agreement. In some cases, as in the instant case, there may be a specific agreement between the subsequent purchaser and the original purchaser regarding conveyance of the property in pursuance of the original agree-

(1) A.I.R. 1954 S.C. 71.

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ment of reconveyance entered into between the original vendor and the original purchaser. The Supreme Court in fact pointed out what would be the proper form of the decree in a case where the original purchaser who had agreed to reconvey the property has sold it to another purchaser.

The learned counsel also referred to a passage from *Anson's Law of Contract* (22nd Ed.) occurring at pp. 441 and 442. The passage reads:

"If one party, by his own acts or default, makes further commercial performance of the contract impossible, he will be considered impliedly to have repudiated the contract, even though he has not, by words or conduct, renounced his intention to fulfil it. Here also the impossibility may be created either before performance is due for in the course of performance".

The quoted passage does not advance the case of the appellant any further than the rulings on which reliance has been placed by his counsel and which we have already noted earlier. However, in our view, the question does not really arise because we have held that neither in fact nor in law there was any repudiation or denouncement of the agreement by defendant no. 1 nor had he done anything which could have the legal result of causing a repudiation of the contract because its performance was rendered an impossibility.

The suit was instituted on 20-1-1962 at a time when Specific Relief Act, 1877 was in force. S. 27 of that Act provided that subject to certain exceptions (with which we are not concerned in this case) specific performance of a contract may be enforced against either party thereto; and any other person claiming under him by a title arising subsequently to the contract, except a transferee

for value who has paid his money in good faith and without notice of the original contract. In view of the statutory provisions contained in s. 27 above, it cannot be legally contended, as was sought to be done by Sri *Saxena*, that the plaintiff had no right to enforce the contract against defendant no. 2. Defendant no. 2, as already mentioned, never repudiated the agreement nor claimed to be a *bona fide* transferee for value without notice. He was certainly a transferee for value but he at the same time was a transferee who had purchased with full notice and knowledge of the agreement in question. In fact he undertook to abide by that agreement. The contention, therefore, that the plaintiff had no right to get the contract performed by defendant no. 2 because there was no privity or mutuality between the plaintiff and defendant no. 2 must be repelled. There is little room for doubt that under certain circumstances a person can enforce an agreement by which or under which he has acquired certain beneficial rights or interest even though he was not a party to the contract itself. It is only in cases where a person had undertaken to perform a personal covenant, which cannot be performed by his successor or representative, that it can be said that specific performance of the contract can be enforced, if at all, against the original contracting party only and not against any other person. That question does not arise in the instant case. Here the agreement was for the reconveyance of the property, the performance of which did not require any personal skill or personal qualification. If the sale-deed could be executed by defendant no. 1, equally with his concurrence, the sale-deed could be executed by defendant no. 2, to which transaction defendant no. 1 could be made to join, if necessary. Further the contract itself did not prohibit the plaintiff as a promisee from accepting performance from a third party.

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The trial court held that Art. 113 of the Limitation Act, 1908, was not applicable. Without mentioning which other Article of the Limitation Act would cover the case the learned Judge, however, held that the plaintiff did not get the property retransferred and his right to obtain a retransfer had come to an end and that the suit was barred by time. In holding that the suit was barred by time the learned Judge, to our mind, committed a clear error. He, it appears, mixed up the question of limitation with the question of accrual or survival of cause of action entitling the plaintiff to sue for a decree for the specific performance of the contract. In so far as the accrual of cause of action is concerned we have already indicated above that the plaintiff did not within the period of two years call upon the defendants to reconvey the property nor did he offer to pay the requisite sum of Rs.25,000. We therefore, agree with the finding of the court below that the plaintiff's right to seek specific performance had come to an end. The suit was bound to fail for want of a subsisting cause of action. The suit was liable to be dismissed on that ground and not on the ground that it was barred by limitation. Art. 113 of the Limitation Act, 1908 prescribed a period of three years for a suit for specific performance of a contract. The period of three years was to be computed from the date fixed for the performance or if no such date was fixed when the plaintiff had notice that performance was refused. Here the period fixed under the agreement was up to 12th December, 1960. Therefore, the suit could have been filed within three years from that date. Since the date for performance was fixed under the agreement, the second part which related to cases where no date was fixed could not apply. The suit was instituted on 20th January, 1962 and was not barred by Art. 113. No other article of the Limi-

tation Act, 1908 was attracted and the court below was wrong in holding that Art. 113 did not apply.

For the reasons stated above the appeal fails and is dismissed. But having regard to all the circumstances of the case we direct the parties to bear their own costs.

Appeal dismissed.

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APPELLATE CIVIL

Before Mr Justice S. Chandra and Mr. Justice

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... APPELLANTS,

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.. RESPONDENTS.

Central Excise Rules, 1944, r 156-A sub-rr. (3) and (4)—Consignor liable to pay duty—Entering into a bond under r 153 is immaterial

The fact that the consignee did not enter into a bond as provided by r 153 is immaterial to his liability to present a triplicate application required by r 156-A(4). The liability to pay the duty under r 156-B is dependent on the failure of the consignee to present the triplicate application irrespective of the reasons or causes for the failure. Simply because the consignee has entered into a bond under r 153 the consignor is not relieved from the requirement of making a triplicate application and his failure to present the certified triplicate makes him liable to pay the duty under r 156-A and B.

Special Appeal no. 167 of 1966 from the judgment and order of D. D. SETH, J. in Civil Miscellaneous Writ no. 2150 of 1959 decided on 19th November, 1965.

T. N. Sapru, for the Appellants.

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K. C. Saxena, for the Respondents.

S CHANDRA, J.:—Messrs. Munshi Lal Budh Sen, the respondent owned a licensed warehouse. Under a licence granted under the Central Excise Act and the Rules the respondent firm is authorised to warehouse the tobacco purchased by him

It appears that 98 bags of tobacco was purchased by Messrs. Ram Swarup Ganga Sagar of Babarpur, district Etawah from the respondent firm in September, 1958. In October, 1958 the same firm purchased tobacco amounting to 107.35 maunds from the respondent firm. The first consignment reached the destination warehouse in Konch and was duly warehoused there, in the warehouse of Chunni Lal Giasilal, who was the commission agent in these transactions

It appears that the second consignment did not reach the destination warehouse. On 13th November, 1958 the Deputy Superintendent, Central Excise, Farrukhabad enquired from the respondent to inform him about the location of the tobacco. The respondent replied that enquiries have revealed that the tobacco did not reach the destination warehouse. Thereupon, by a notice dated 23rd January, 1959 the Central Excise Authorities demanded from the respondent duty of Rs.4,840.72 under r 156-B of the Central Excise Rules. Aggrieved the respondent filed an appeal which was, however dismissed on 13th August, 1959 by the Collector, Central Excise. Thereupon, the respondent instituted a writ petition in this Court.

A learned single Judge of this Court held that so long the consignee does not comply with sub-r. (3) of r. 156-A of the Central Excise Rules the consignor cannot validly be called upon to present an application in triplicate

as contemplated by sub-r. (4) of r 156-A. Consequently the consignor cannot be held guilty of failure to present the aforesaid application in triplicate within the meaning of r. 156-B and the Department was not justified in demanding penalty from the respondent, upon the goods having failed to reach the destination warehouse. On these findings the writ petition was allowed and a direction was issued to the Department not to demand any duty from the respondent in respect of the tobacco in dispute.

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In our opinion the learned single Judge misconstrued the relevant rules.

Chap. VIII of the Excise Manual lays down the rules for warehousing. Under r. 140 a person keeping a private warehouse has to furnish a bond in the prescribed form with such surety or sufficient security, in such amount and under such conditions as the Collector approves, and binding himself: -

“to pay the duty due on the goods deposited therein or for the due and safe removal of such goods from one part or division of any warehouse to any other part or division of same warehouse, or to any other warehouse,

and for the due observance of the terms, conditions and requirements of the Act, these Rules and any order made hereunder in respect thereof.”

Presumably the respondent, when he became the keeper of a warehouse must have furnished a bond as required by r. 140. This bond is for binding the warehouse keeper in respect of the three matters mentioned above, of which one is the due and safe removal of the goods deposited in the warehouse from that warehouse to another warehouse.

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R. 156-A prescribes the procedure in respect of removal of goods from one warehouse to another and it provides:

"156-A. Procedure in respect of goods removed from one warehouse to another—(1) the application for removal of goods from one warehouse to another shall be presented by the consignor in triplicate, and in the proper form, to the officer-in-charge of the warehouse of removal, at least 24 hours before the intended removal, together with such other information as the Collector may by general or special order require.

(2) Such officer shall then take account of the goods, and after completing the removal certificate on all the copies of the application, shall send the duplicate to the officer-in-charge of the warehouse of destination, and hand over the triplicate to the consignor for despatch to the consignee. He shall also deliver to the consignor a transport permit in the proper form.

(3) On arrival of the goods at the warehouse of destination, the consignee shall present them together with the triplicate application and the transport permit to the officer-in-charge of such warehouse, who shall, after taking account of the goods, complete the re-warehousing certificate on the duplicate and the triplicate application, return the duplicate to the officer-in-charge of the warehouse of removal, and triplicate to the consignee for despatch to the consignor.

(4) The consignor shall present the triplicate application duly endorsed with such certificate to the officer-in-charge of the warehouse of removal within ninety days of the date of issue of the transport permit under sub-r. (2)".

R. 156-B lays down the consequences for failure to present triplicate application mentioned in sub-r. (4) of r. 156-A. Under sub-r. (1) thereto if the consignor fails to present the triplicate application to the officer-in-charge of the warehouse of removal in the manner laid down in sub-r. (4) of r. 156-A and the duplicate application endorsed with the re-warehousing certificate has also not been received by such officer from the officer-in-charge of the warehouse of destination, the consignor shall, upon a written demand being made by the former officer, pay the duty leviable on such goods within ten days of the notice of demand and if the duty is not so paid he shall not be permitted to make fresh removals of any warehouse goods from one warehouse to another until the duty is paid or until the triplicate application is so presented or the duplicate application is so received.

It will be seen that the consignor becomes liable to pay the duty if the two conditions co-exist. One is his failure to present the triplicate application and the non-receipt of the duplicate application duly endorsed with the re-warehousing certificate, and the second is that a demand for the payment of duty is made upon him. The liability to pay the duty has been made dependent upon the failure of the consignor to present a triplicate application as required by sub-r. (4) of r. 156-A or any such other or similar default committed by him. It has to be borne in mind that r. 156-B does not provide for any punishment upon a defaulting consignor. It only holds him liable to pay the duty. Under the other rules the goods deposited in private warehouse, like the respondent's warehouse, the goods cannot be removed therefrom without the payment of the excise duty. The exception is when the goods are removed in order to take them to another warehouse as contemplated by r. 156-A.

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In such cases the consignor has to make an application in triplicate to the officer-in-charge of the warehouse of removal. The officer-in-charge of the removal warehouse shall also send the duplicate to the officer-in-charge of the warehouse of destination and hand over the triplicate to the consignor for despatch to the consignee. He shall also deliver to the consignor a transport permit in the proper form. On arrival of the goods at the warehouse of destination the consignee is to present the triplicate application and after the requisite endorsement return it to the consignor. The consignor has to present a duplicate application to the officer-in-charge of the warehouse of removal within the prescribed period of time. This is the procedure amounting on the application of the consignor.

R. 153, however, lays down that when the goods are removed from one warehouse to another warehouse the consignor or the consignee of the goods shall, before removal, enter into a bond in a proper form, with such surety or sufficient security, and under such conditions as the Collector approves, in a sum equal at least to the duty payable on such goods for the due arrival and re-warehousing thereof to the warehouse of destination. In view of this Rule the consignor or the consignee has to enter into the requisite bond. In the present case the consignee entered into a bond while the consignor did not.

In our opinion, the fact that the consignor did not enter into a bond as provided by r. 153 is immaterial to his liability to present a triplicate application required by r. 156-A(4). The liability to pay the duty under r. 156-B is dependent on the failure of the consignor to present the triplicate application irrespective of the reasons or causes for the failure. It is not dependent on the failure being without sufficient cause.

It appears that the scheme of the rules is to protect the Government in respect of the duty payable on warehoused goods, as against both, the consignor and the consignee. Simply because the consignee has entered into a bond under r 153 the consignor is not relieved from the requirement of making a triplicate application and his failure to present the certified triplicate makes him liable to pay the duty under rr. 156-A and B.

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In our opinion, the appellants were justified in demanding duty from the respondent.

In the result, the appeal succeeds and is accordingly allowed. The judgment of the learned single Judge is set aside. The writ petition filed by the respondents is dismissed with costs.

Special Appeal allowed

CIVIL MISCELLANEOUS (F. B.)

Before Mr. Justice S. N. Dwivedi, Mr. Justice J. S. Trivedi and Mr. Justice C. S. P. Singh

D. C. PULIANI

PETITIONER.

v.

INCOME TAX COMMISSIONER,

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AND OTHERS

... RESPONDENTS.

Income Tax Act, 1961, s. 221—*Whether Income-tax Officer has power to impose penalty under s. 221 of the Act.*

When s. 221 is read along with s. 246(1) and (o), there is left no room for doubt that the power under s. 221 is exercisable by the Income-tax Officer.

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v.
COMMISSIONER*Smt Kusum Kumari v. Union of India* (1) over-ruled.Interpretation of Statutes—*Superfluity may be imputed to the Parliament only in the last resort.*

Obviously s 221 does not empower specifically any authority to impose penalty on an assessee who has defaulted in payment of tax due to him. But it can not be assumed that s. 221 is *otiose*. Superfluity may be imputed to the Parliament only in the last resort if no other provision in the Act is found to repair the omission in s. 221. A section in a statute should be construed in all its inter-connections.

Civil Miscellaneous Writ Petition no. 3068 of 1971.

Ajit Dhawan and Bharatji Agarwal, for the Petitioner
S. C. for Respondents.

S. N. DWIVEDI, J.:—The petitioner defaulted in the payment of income-tax assessed on him. The Income-tax Officer imposed a penalty on him in accordance with s 221 Income Tax Act. The petitioner filed a revision before the Commissioner of Income-tax against the order imposing penalty. It was rejected. He has now filed the present petition.

When the petition came up for hearing before a Division Bench, the petitioner argued that as s 221 does not give power to impose penalty to the Income-tax Officer specifically, the order imposing penalty is without power and invalid. He relied on *Smt Kusum Kumari v. Union of India* (1). It is a Division Bench decision of the Court. The decision squarely supports the petitioner's argument. But the Bench hearing this petition had doubts about the correctness of *Smt. Kusum Kumari* (1). So the case has been referred to a larger Bench. Hence this petition is before us now.

S. 221 materially reads:

“(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and

the amount of interest payable under sub-s. (2) of s. 220, be liable to pay by way of penalty, an amount which, in the case of a continuing default, may be increased from time to time, so however, that the total amount, of penalty does not exceed the amount of tax in arrears”.

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Obviously, s. 221 does not empower specifically any authority to impose penalty on an assessee who has defaulted in payment of tax due by him. But it cannot be assumed that s. 221 is *otiose*. Superfluity may be imputed to the Parliament only in the last resort if no other provision in the Act is found to repair the omission in s. 221. It is a familiar rule of interpretation that a section in a statute should be construed in all its inter-connections. Other provisions of the Act should be examined to find out its true import. Bearing in mind this familiar rule, we will examine other provisions of the Act. S. 246 provides for the filing of an appeal against various orders of the Income-tax Officer. It says that an assessee aggrieved by any of the orders of an Income-tax Officer, which are specified there in, may appeal to the Appellate Assistant Commissioner. Cl. (o) of s. 246 mentions an order imposing a penalty under s. 221. It is unmistakably clear from s. 246(o) that an order imposing penalty under s. 221 may be made by an Income-tax Officer. S. 246(1) provides for an appeal from an order of the Income-tax Officer made under s. 201. S. 201(1) provides that if the principal officer on the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under the Act, he or it shall, be deemed to be an assessee in default in respect of the tax. The proviso to sub-s. (1) of s. 201 reads:

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"Provided that no penalty shall be charged under s. 221 from such person, principal officer or company unless the Income-tax Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax"

The proviso also clearly shows that an Income-tax Officer may impose penalty under s. 221 S. 246(1) and (o) are there in the Act from its very beginning. So when we read s. 221 in conjunction with s. 246(1) and (o) and the proviso to sub-s. (1) of s. 201, there remains no doubt that an Income-tax Officer is authorised to impose penalty under s. 221.

The immediate background of s. 221 also indicates that it authorises the Income-tax Officer to impose penalty in default of payment of tax. Chap. XVII of the Income Tax Act is headed as "Collection and recovery of tax" The chapter has got several sub-chapters One sub-chapter is headed as "Collection and recovery" This sub-chapter consists of 13 sections (sections 220 to 232) S. 221 fixes the date for payment of the tax due Tax is to be paid within 35 days of the service of the notice of demand on the assessee The proviso to sub-s. (1) of s. 220 indicates that the power under the proviso is to be exercised by the Income-tax Officer. S. 222 requires a certificate to be sent to the Tax Recovery Officer for collection of the arrears of tax The certificate is to be issued by the Income-tax Officer. S. 225 provides for stay of proceedings for recovery of tax and the amendment or withdrawal of the certificate by the Income-tax Officer S. 226 states that notwithstanding the issue of a certificate to the Tax Recovery Officer under s. 222, the Income-tax Officer may recover the tax by any one or more of the modes provided therein S. 228 provides for the recovery of tax from a person in Pakistan on the certificate issued by the Income-tax

Officer. S. 229 provides that penalty shall also be recovered in the manner provided for the recovery of tax. S. 230 empowers the Income-tax Officer to take action in a certain contingency. S. 230-A also empowers the Income-tax Officer to take certain action in a certain other contingency. S. 232 authorises the Income-tax Officer to institute a suit for recovery of tax. It is only s. 221 which does not expressly authorises the Income-tax Officer to impose penalty. But its immediate context would suggest that Parliament intended to authorise the Income-tax Officer to impose penalty.

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Dwivedi, J

Counsel for the petitioner wants us to apply the rule of strict interpretation to the construction of s. 221. But the rule of strict interpretation does not allow the Court to overlook the relevant context of s. 221. As already stated, when s. 221 is read along with s. 246(1) and (o), there is left no room for doubt that the power under s. 221 is exercisable by the Income-tax Officer. In *Smt. Kusum Kumari v Union of India* (1) the Bench was not referred to s. 246(1) and (o).

Counsel for the petitioner has also referred us to the amendment made by Parliament in s. 221. The amended s. 221 authorises expressly the Income-tax Officer to impose penalty in default of payment of tax. But the amendment cannot assist in the construction of the unamended s. 221.

No other point has been pressed before us.

In the result, the petition is dismissed with costs.

Petition dismissed.

CIVIL REFERENCE (F.B.)

Before Mr. Justice S. N. Dwivedi, Mr. Justice J. S.
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COMMISSIONER OF INCOME TAX APPLICANT,

v.

NATHIMAL GAYA LAL ... OPPOSITE-PARTY.

Indian Income Tax Act, 1922, ss 25 A(1) and (3) and 28 (1) (c)—Penalty imposed under s 28(1)(c) on Hindu undivided family on 22nd August, 1963—Assessee's appeal in partition allowed by Tribunal holding disruption of Hindu undivided family from 6th May, 1958—No order of penalty can be passed under s 28(1)(c).

Before an order of penalty can be sustained, the assessable entity on which the penalty is being imposed must be in existence on the date of the order.

An order of penalty passed against a Hindu undivided family on 22nd August, 1963, by the Income-tax Officer cannot be sustained when the Tribunal had allowed its appeal by an order dated 12th December, 1963, recognising its partition as from 6th May, 1958 as claimed by it.

The fiction created by s. 25-A(3) does not come into play in a case where an order under s. 25-A has been passed. To put a different interpretation on s. 25-A(3) would work unnecessary hardship and injustice on assessees.

Commissioner of Income-tax v. Gauri Shanker Chandra Bhan (1) over-ruled.

Income-tax Reference no. 161 of 1970

C. S. P. SINGH, J.:—The assessee was in the relevant assessment year 1948-49 a Hindu undivided family. Its assessment for that year was made by including not only the returned income but by also including certain credits appearing in the books of the assessee, as being income from undisclosed source. In view of the additions made in the income, the Income-tax Officer issued

a notice under s 28(3) of the Income Tax Act, 1922 on 27th February, 1958. The penalty proceedings were long drawn out and eventually terminated by an order dated 22nd August, 1963 by which the Income-tax Officer imposed a penalty on the assessee for concealing its income. The assessee had, while the penalty proceedings were pending, claimed a partition of the joint Hindu undivided family as from 6th May, 1958. The Income-tax Officer had not accepted the partition, but the assessee went up in appeal against that order, and the appeal was eventually allowed on the 12th December, 1963 recognising the partition as from 6th May, 1958. Against the order of penalty, the assessee filed an appeal before the Appellate Assistant Commissioner, but the same was dismissed on 17th April, 1967. Thereafter a second appeal was filed by the assessee before the Income-tax Appellate Tribunal which was allowed. The Tribunal upheld the contention of the assessee, that, inasmuch as on the date of the final order, the Hindu undivided family had disrupted, no order of penalty could in the circumstances be passed.

The Commissioner of Income-tax applied for and obtained a reference to this Court. On the reference coming up for hearing, the Department relied on a decision of this Court in *Commissioner of Income-tax v. Gauri Shanker Chandra Bhan* (1) and contended that inasmuch as no order under s. 25-A(1) of the Income Tax Act, 1922 had been passed on the date when the penalty order was imposed, the order of penalty was justified and the Tribunal erred in cancelling the same. The Bench, however, in view of a large number of decisions of other High Courts to the contrary doubted the cor-

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rectness of the decision given in *Commissioner of Income-tax v. Gauri Shanker Chandra Bhan* (1) and as such referred the matter after reframing the question to a larger Bench, and that is how the case has now come up before us. The question referred for our answer is:

"Whether on the facts and in the circumstances of the case the Appellate Tribunal was justified in cancelling the penalty imposed under s. 28(1)(c) of the Indian Income Tax Act, 1922?"

It is not disputed that on the date when the order of penalty was imposed the Hindu undivided family against which the order of penalty was made was factually not in existence, and in fact had been partitioned as far back as the 6th May, 1958. The main stay of the Department's case is based on s 25-A(3) of the Act. The section so far as is relevant may be extracted:

"25-A *Assessment after partition of a Hindu undivided family*—(1) Where at the time of making an assessment under s 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place, among the members of such family, the Income-tax Officer shall make such inquiry therein as he may think fit and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect:

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2)

(1) (1972) 88 I.T.R. 88.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

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Counsel for the Department has strongly relied upon the fiction created by s. 25-A(3), and has contended that till such time an order under s. 25-A(1) of the Act has not been passed, the family has to be taken to be joint for the purposes of the Act, and inasmuch as the Appellate order passed under s. 25-A(1) was made after the Income-tax Officer had already imposed penalty, the order in question was a valid one, and the Tribunal was unjustified in reversing this finding. There is preponderance of authority against the acceptance of this contention, and we propose to refer to these decisions before commenting on the decision of this Court in *Commissioner of Income-tax v. Gauri Shanker Chandra Bhan* (1)

In *Commissioner of Income-tax B & O v. Sanichar Sah Bhim Sah* (2) the claim of the assessee that the partition had taken place with effect from 13th February, 1946 was accepted. Penalty proceedings under s. 28 (c) of the Act were started subsequently on 23rd March, 1946. The Patna High Court held that before an order for penalty could be passed against the Hindu undivided family, it must be a joint undivided family as on the date when proceedings for penalty are started as also on the date when the Income-tax Officer imposed penalty and inasmuch as the Hindu undivided family did not exist on these dates, the order of penalty could not be sustained. One of the reasons that impelled the Court

(1) (1972) 88 I.T.R. 88

(2) A.I.R. 1955 Pat. 108.

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to take this view was that before an order for penalty could be passed against the Hindu undivided family, notice had to be given and an opportunity to show cause had to be afforded and inasmuch as it was not possible either to give notice to Hindu undivided family to hear it as disruption had taken place, the order imposing penalty could not be passed. The Patna High Court reaffirmed the view taken by it in a subsequent decision in *Jankidas Mohanlal v. Commissioner of Income-tax* (1). In *S. A. Raju Chettiar v. Collector of Madras* (2) proceedings for imposition of penalty were initiated while the joint family was in existence. Before the order of penalty was passed the claim of the assessee under s 25-A had been allowed. The Madras High Court followed the Patna High Court. Placing reliance on the Patna High Court decision, the Madras High Court held that inasmuch as on the date when the order was passed, the undivided family had ceased to exist, the imposition of penalty was invalid. When a similar question came up before the Madras High Court in the case of *M. R. Chinnaswami Gounder v. Commissioner of Income-tax* (3), a contention was raised that the alleged decision required a reconsideration. Their Lordships repelled the contention and reaffirmed the view expressed in *S. A. Raju Chettiar v. Collector of Madras* (2). The views expressed by the Madras High Court in these two decisions were reiterated by that Court in two subsequent decisions in *P. S. Kandaswami Mudaliar v. Commissioner of Income-tax* (4) and *Commissioner of Income-tax v. Suresh Gokuldas* (5). The Andhra Pradesh High Court took a similar view in *Mahankali Subbarao v. Commissioner of Income-tax* (6). The Andhra Pradesh High Court reaffirmed this view in a

(1) (1961) 54 I.T.R. 254

(2) A.I.R. 1956 Mad 344.

(3) 75 I.T.R. 62.

(2) (1956) 29 I.T.R. 241.

(4) 72 I.T.R. 212

(6) A.I.R. 1956 A.P. 118

subsequent Full Bench decision in the case of *Commissioner of Andhra Pradesh v. Tatavarthy Narayanamurthy* (1). The Punjab High Court, in the case of *Commissioner of Income-tax Punjab v. Motu Ram Prem Chand* (2) has spoken in unison with the decisions of the other High Courts referred to earlier.

The lone sentinel for the view canvassed on behalf of the Revenue, is the decision in the case of *Commissioner of Income-tax v. Gauri Shanker Chandra Bhan* (3) and it is now necessary to consider this case. The assessee in this case was a Hindu undivided family and was assessed for the assessment year 1946-47. On the 19th March, 1957, an application was moved before the Income-tax Officer under s 25-A claiming that a partition had taken place on the 22nd June, 1956, and the Income-tax Officer passed an order on the 26th March, 1962 recording the partition. In respect of the assessment year in question, penalty proceedings were initiated by the Income-tax Officer by issue of a notice on the 15th March, 1957, and an order imposing a penalty was passed on the 20th March, 1958. The assessee contended that inasmuch as the partition of the family had been accepted with effect from 22nd June, 1956, the order imposing penalty was illegal. This contention was accepted by the Tribunal and the penalty cancelled. The Bench after noticing the decisions of the Madras, Patna and Punjab High Courts and a decision of this Court in the case of *Jagannath Rameshwar Prasad v. Commissioner of Income-Tax, U. P.* (4) referred to a decision of the Supreme Court in the case of *Additional Income-tax Officer, Cuddappah v. A. Thimmayya* (5) and being of the view that *A. Thimmayya's* case (5) clearly posited that the Income-tax Officer had jurisdiction to pass the penalty order held that the view taken

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(1) (1972) 88 I.T.R. 58

(2) (1967) 66 I.T.R. 688.

(3) (1972) 88 I.T.R. 88.

(4) (1968) 68 I.T.R. 858.

(5) 999 A.L.J. 99 (1961) (9)

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by the Tribunal was incorrect. The main reason given by the Bench for taking this view was that inasmuch as no order recognizing the partition under s. 25-A(1) was in existence on the date when the impugned order of penalty was passed, the jurisdiction of the Income-tax Officer to pass the order in question remained unaffected. With respect, we are unable to accept the view expressed by the Division Bench. In the first place, *A. Thimmayya's case* (1) related to assessment proceedings and not to proceedings for imposition of penalty and as such the principles laid down in that case are not opposite in a case of imposition of penalty. The Andhra Pradesh High Court in the case of *Commissioner of Andhra Pradesh v. Tatavarthy Narayanamurthy* (2) has given cogent reasons for not extending the principles of *A. Thimmayya's case* (1) to a case under s. 28 of the Act and we are substantially in agreement with the reasons given by that Court. This apart, *A. Thimmayya's case* (1) does not lay down that an order of the Income-tax Officer imposing a penalty in a case where a partition has been recognised with effect from a date earlier to the order in question would be a valid order as has been assumed by the Division Bench. In *A. Thimmayya's case* (1), assessments for the years 1941-42, 1942-43, 1943-44, 1944-45, 1945-46 and 1946-47 were completed by the Income-tax Officer. Pending the assessment proceedings, a claim under s. 25-A of the Act had been made, but this was disposed of only the 30th June, 1952 in favour of the assessee and partition was recognised with effect from 2nd November, 1946. This order was, however, passed subsequent to the assessment proceedings. Appeals against the assessment were filed right up to the Tribunal, but they failed and in these appeals, no plea was taken by the assessee that the assessment was not valid as partition had

(1) (1965) 55 I.T.R. 666,

(2) (1972) 88 I.T.R. 88

been recognised under s. 25-A of the Act. Hereafter as the tax was not paid, the Income-tax Officer made an order under s. 46(5) of the Act calling upon the Managing Director of the company, which had taken over the business of the family, to withhold the amount of tax from the salaries payable to some of the members of the erstwhile Hindu undivided family. A petition was filed in the Andhra Pradesh High Court challenging the recovery on two grounds viz. that recovery proceedings could not be taken without an order under s. 25-A(2) of the Act and that the arrears of tax due from the erstwhile Hindu undivided family could not be recovered from the petitioner. It was in this context that the Supreme Court made the following observation on page 671 of the report in *A. Thimmayya's* case (1):

"The scheme of s. 25-A is therefore clear: a Hindu undivided family hitherto assessed in respect of its income will continue to be assessed in that status notwithstanding partition of the property among its members. If a claim is raised at the time of making an assessment that a partition has been effected the Income-tax Officer must make an inquiry after notice to all the members of the family and make an order that the family property has been partitioned in definite portions, if he is satisfied in that behalf. The Income-tax Officer is by law required still to make the assessment of the income of the Hindu undivided family, as if no partition had taken place and then to apportion the total tax liability and to add to the separate income of the members or groups of members the tax proportionate to the portion of the joint family property allotted to such member or groups of members and to make under s. 23 assessment on the members accordingly. If no claim for recording

(1) (1965) 55 I.T.R. 666.

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partition is made, or if a claim is made and it is disallowed or the claim is not considered by the Income-tax Officer, the assessment of the Hindu undivided family which has hitherto been assessed as undivided will continue to be made as if the Hindu undivided family has received the income and is liable to be assessed.

Failure to make an order on the claim made does not affect the jurisdiction of the Income-tax Officer to make an assessment of the Hindu family which had hitherto been assessed as undivided. The Income-tax Officer may assess the income of the Hindu family hitherto assessed as undivided notwithstanding partition, if no claim in that behalf has been made to him or if he is not satisfied about the truth of the claim that the joint family property has been partitioned in definite portions, or if on account of some error or inadvertence he fails to dispose of the claim. In all these cases his jurisdiction to assess the income of the family hitherto assessed as undivided remains unaffected, for the procedure for making assessment of tax is statutory. Any error or irregularity in the assessment may be rectified in the manner provided by the statute alone and the assessment is not liable to be challenged collaterally.

In the present case, claim was undoubtedly made at the time of making an assessment, that the property of the family was partitioned. The claim was not disposed of before making the assessment and the Income-tax Officer proceeded to assess the income of the family as if the property of the family had not been partitioned. It is true that by order dated June 30, 1952, the Income-tax Officer held

that the property of the family was partitioned on November 2, 1946:

"But the Act contains no machinery authorising an Income-tax Officer to reopen an assessment of a Hindu undivided family relying upon an order made by him under s. 25-A(1) after the order of assessment is made. In the present case, appeals were filed and it is common ground that no objection was raised as to the regularity or legality of the procedure followed by the Income-tax Officer. The assessment proceedings were taken to the Income-tax Appellate Tribunal and the orders of assessment were confirmed. Thereafter, it was not open to the Income-tax Officer to reopen the orders of assessment relying upon the order recording the partition, and to seek to subvert orders which had become final under the seal of the Income-tax Appellate Tribunal. The High Court was, in our judgment in error in holding that an order of assessment which has become final is liable to be reopened under s. 25-A(2) by the Income-tax Officer, when an order under s. 25-A(1) is passed by him subsequent to the order of assessment'."

It will be seen that the challenge to the recovery proceedings failed, firstly on the ground that the assessment order could not be challenged collaterally, and secondly there was no machinery provided for in the Act, for reopening of assessment after an order under s. 25-A of the Act was passed and also that the assessment if it had become final would sustain the recovery. The reliance by the Division Bench on *A. Thimmayya's* case (1) for the conclusion which they reached does not with respect appear to be well-founded. Apart from

(1) (1955) 55 I.T.R. 686.

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relying on *A. Thimmayya's* case (1) the Bench did not give any reasons of its own for dissenting from the view expressed by the Patna, Madras and Punjab High Courts. After a careful consideration of the views of these High Courts as also the cases referred to earlier, we are of the view that before an order of penalty can be sustained, the assessable entity on which the penalty is being imposed must be in existence on the date of the order.

There are other considerations which impel us to take the view that the fiction created by s. 25-A(3) would not be applicable to a case like the present one. We have already extracted s. 25-A of the Act in the earlier part of this judgment. It will be noticed that the fiction created by sub-s. (3) of s. 25-A of the Act comes into play only "Where such an order has not been passed in respect of a Hindu undivided family." In the present case, an order under s. 25-A(1) of the Act has admittedly been passed at the appellate stage, but inasmuch as an appeal is but a continuation of the original proceedings, the order passed by the Appellate Commissioner would be still an order under s. 25-A(1). That being so the foundation for the applicability of s. 25-A disappears. This interpretation which we seek to put on this sub-clause, has the approval of their Lordships of the Supreme Court in the case of *Joint Family of Udayan Chinubhai etc. v. Commissioner of Income-tax Gujrat*, (2) where dealing with this aspect of the matter, their Lordships observed at page 423 as under:

"Under cl. (3) of s. 25-A, if no order has been made notwithstanding the severance of the joint family status, the family continuous to be liable to be assessed in the status of a Hindu undivided family, but once an order has been passed the recognition

(1) (1965) 55 I.T.R. 686.

(2) (1967) 68 I.T.R. 416.

of severance is granted by the income-tax department, and cl. (3) of s. 25-A will have no application."

Moreover as s. 25-A(3) is a provision which creates a legal fiction, we have to interpret the provision in such a manner as would not work injustice to a party, for even when the Court steps into the world of legal fantasy, the principle of equity and justice cannot be lost sight of as has been said in *Lachchmi Narain v. Munni Lal* (1), where one of us speaking for the Court observed as under:

"Fiction is a conscious error, a deliberate falsehood. It can therefore never attain apotheosis, nor can it be used to work injustice. As an illustration, the fiction of corporate personality has never been used to conceal the fraud or illegality committed by the agents of a corporation. Courts may use a legal fiction as a crutch to help the variety reach justice."

According to Blackstone:

"... these fictions of law though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience that might result from the general rule of law. So true it is that in *fictione juris semper subsistit aequitas* (in a fiction of law equity must always subsist) (*Blackstone's Commentaries* abridged by George Chase, IV Edn, p. 637)."

(1) (1968) A.L.J. 821.

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STONE, J. said:

"While fictions are sometimes invented in order to realise the judicial conception of justice, we cannot define the constitutional guarantee in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid."

Curry v. Mccanless (1) see also *G. T. Helvering v. Stockolmes Enskilda Bank* (2)."

In case the interpretation canvassed for on behalf of Revenue is accepted, certain inequitable consequences follow. An order under s. 25-A of the Act is appealable, and it is open to the appellate authorities to recognise a partition which has not been accepted by the Income-tax Officer. It is quite common for orders of penalty being passed by the Income-tax Officer against a Hindu undivided family whose claim for partition under s. 25-A is upheld subsequent to the imposing of penalty, and in case the contention of the Department is accepted, the result would be that the assessee would be deprived of the benefit of the appellate order. Such a situation would inflict undue hardship and injustice and has to be avoided. This consideration apart, it seems to us that unless we substitute the word 'until' for the word 'where' occurring in sub-s. (3) the contention made on behalf of the Revenue cannot succeed, for if the word 'where' occurring in sub-s. (3) interpreted as it is all that is required to take a case out of sub-s. (3) is the existence of an order under s. 25-A. It is not permissible to make such a substitution where the language of the statute is clear and unambiguous. The Madras High Court in two cases, namely, *Commissioner of Income-tax v. K. M. N. Swaminathan* (3) and *S. A. Raju Chettiar v. Collector of Madras* (4) has negatived such an approach. PATANJALI SASTRI in

(1) 83 Led. 1389 at p. 1351.

(3) (1947) 15 I.T.R. 480.

(2) 79 Led. 211 at p. 217

(4) (1956) 29 I.T.R. 241.

Swaminathan's case (1) on page 439 observed as under :

"On the other hand, Mr. *Rama Rao Saheb* for the Commissioner suggested that sub-s. (3) of s. 25-A could operate independently of sub-s. (1) and (2) and as the order of the Appellate Assistant Commissioner accepting the partition was passed only on the 17th August, 1942, the family which had till then been assessed as undivided must be deemed to have continued to be undivided on the 6th July, 1942, when the notice under s. 34 was issued to the assessee, so that the assessment made on that basis was in order. We are unable to agree with either of these views of the matter. The contention on behalf of the Commissioner assumes that the words 'where such an order has not been passed in respect of a Hindu undivided family hitherto assessed as undivided' cover every case of a joint family sought to be assessed in respect of which the Income-tax authorities have not till then recorded an order that a partition has taken place and that until the date of such an order all such families should be dealt with as undivided. We do not think that this is a correct view of sub-s. (3). As pointed out by their Lordships in *Sundar Singh Majithia v. Commissioner of Income-tax United and Central Provinces* (2) s. 25-A relates only to Hindu undivided families which have been disrupted and the opening words of sub-s. (3) quoted above refer to cases where a claim that a partition had taken place has been made under sub-s. (1) and such claim has been rejected by the Income-tax Officer. Thus sub-s (3) is complementary to sub-s. (2) and both deal with cases falling under sub-s. (1). Nor is it correct to say that the family should be deemed to continue undivided till the

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(1) (1947) 15 I.T.R. 480.

(2) (1942) 10 I.T.R. 467.

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date of the Income-tax Officer's order under the section. Where an order is made accepting the partition alleged by the assessee the family must be regarded as having become disrupted on the date of partition as put forward by the assessee. In the present case, therefore, when the notice under s. 34 was issued to the assessee on the 6th July, 1942, the family must be taken to have ceased to exist having taken place on the 21st January, 1940, was having taken place on the 21st January, 1940, was accepted only on the 17th August, 1942."

Apart from this, a Division Bench of this Court in the case of *Jagannath Rameshwar Prasad v. Commissioner of Income-tax, U. P.* (1) has taken the view that s. 25-A(3) does not contemplate a case where a claim has been made under s. 25-A(1) and is pending consideration. In the present case too, the claim of the assessee under s. 25-A(1) of the Act was pending consideration before the Appellate Assistant Commissioner, at the time when the penalty order was passed, and as such the dictum of that case would apply to the present controversy and the mere fact that in the case of *Jagannath Rameshwar Prasad v. Commissioner of Income-tax U. P.* (1) the claim under s. 25-A of the Act was pending before the Income-tax Officer and not in appeal, would in our view make no difference, as an appeal is but a continuation of the original proceedings we however, express no final view on this aspect. We are thus of the view that the fiction created by s. 25-A(3) does not come into play in a case where an order under s. 25-A of the Act has been passed. To put a different interpretation on s. 25-A(3) would work unnecessary hardship and injustice on assesseees, for the reasons already indicated.

We are, therefore, of the view that the case of *Commissioner of Income-tax v Gauri Shanker Chandra Bhan* (1) was not correctly decided. We, therefore answer the question in the affirmative and in favour of the assessee. The assessee is entitled to its costs which we assess at Rs 200. Counsel's fee is assessed at the same figure.

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Question Answered.

APPELLATE CIVIL

Before Mr. Justice S. Chandra and Mr. Justice N. D. Ojha

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U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 176 and r 157—Suit for partition of holding—Civil Court decree on the basis of compromise—Decree without jurisdiction

Where soon after the institution of the suit in the Civil Court the parties filed a compromise praying that the parties to the suit may be allotted shares in accordance with that such a decree would be without jurisdiction and not thereof without referring the matter to the Collector *held*; that such a decree would be without jurisdiction and not operative or binding between the parties.

Special Appeal no. 409 of 1966 against the judgment and decree of S. K. VERMA, J., dated 23rd March, 1966.

V. K. S. Chaudhari and B. B. P. Singh, for the Appellants.

(1) (1972) 85 I.T.R. 88.

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R. N. Bhalla, S. C., for the Respondents.

S. CHANDRA, J.:—This appeal arises out of proceedings for partition of a holding held by the consolidation authorities

Admittedly, the appellant held one-third share in the holding in dispute; one-third was held by respondents nos 3 and 4 while the remaining one-third was held by appellants nos 2 to 5. The consolidation authorities proceeded to partition this holding in accordance with the admitted shares, after ignoring a decree dated 9th March, 1956 passed by the civil court in a suit (no. 892 of 1955) filed under s. 176 of the U P Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) for the division of this very holding. The Settlement Officer (Consolidation) held that since the civil court decree had not been enforced inasmuch as the final decree had not been passed by the revenue court the same had no binding effect. The Settlement Officer (Consolidation) confirmed the actual division of the holding made by the Consolidation Officer.

Aggrieved appellant no 1 instituted a writ petition in this Court. The principal argument raised before the learned single Judge was that the previous partition decree was binding on the parties. This plea was repelled and the writ petition was dismissed.

In present appeal, Mr. *V. K. S. Chaudhary*, learned counsel for the appellants has urged that the civil court decree was binding. In 1955, when the suit for partition under s. 176 of the Act was instituted the matter was governed by ss. 176 to 182-B of the Act. Dealing with these provisions a Division Bench of this Court in *Nathu Singh v. Dular Singh* (1) held that the prescribed procedure was that a suit for partition was to be instituted in a civil court. The civil court was to grant a

(1) 1971 R. D. 11.

preliminary decree indicating the shares of the parties in the holding in dispute. After that its jurisdiction was exhausted; and the matter had to be sent to the Collector for drawing up a final decree. It was held that the civil court had no jurisdiction to pass the final partition decree that was a matter falling entirely within the jurisdiction of the Collector.

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In the present case we find that soon after the institution of the suit in the civil court the parties filed a compromise praying that the parties to the suit may be allotted shares in accordance with that compromise. The compromise mentioned the plots which the parties agreed to be allotted to each branch; and it appears that the civil court passed a decree in terms of the compromise. It is apparent that the matter was never sent to the Collector for final partition of the holding or separation of the shares and for passing a decree in terms of the compromise application. In view of the Division Bench decision in *Nathu Singh's* case (1) the decree passed by the Civil Court will be without jurisdiction and so not operative or binding between the parties.

Learned counsel for the appellants, however, relied upon a Full Bench decision in *Jogodishury Deben v. Kailash Chandra Lahury* (2) and urged that where no division of revenue is sought for, the civil court can grant a decree for partition and a decree for possession in respect of a share. Reliance was also placed upon *Radha Kishun v. Bhola Chaudhuri* (3) where it was held that s. 54, C. P. C. does not apply to a suit for partition of a revenue paying estate when no separate allotment of revenue is asked for. The principle laid down in these decisions is that if the suit did not involve the separation of the land revenue the matter need not go to the Collector and such a suit for parti-

(1) 1971 R.D. 11.

(2) (1897) 24 Cal. 725.

(3) A.I.R. 1984 Pat. 365.

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tion would be exclusively decided by the civil court. Assuming that this is the correct situation in law, the position in the present case is different. The suit under s. 176 of the Act is governed by the statutory provisions contained in ss 176 to 182-B.

S. 182-B provides:

“Subject to the provisions of ss 178 to 182 the division of a holding or the separation of the share therein of a *bhumidhar* or *sirdar* shall be made by the Court in accordance with the principles that may be prescribed.”

Rr 156 to 164 are the relevant rules in this behalf. R. 156 provides:

“Ss 176 to 182. *Division of Holdings*—(1) A plaint for division of a holding under s. 176 shall contain the particulars mentioned in cls (1) to (6) of r. 127 and *the land revenue payable for the holding.*”

This would show that the plaint itself has to mention the land revenue payable in respect of the holding which is sought to be partitioned. R. 158 provides:

“In making a division to which sub-s. (1) of s. 178 does not apply the provisions contained in rr. 127 to 132 shall apply *mutatis mutandis.*”

The present is not a case covered by s. 178 of the Act which applies to the cases of division of a holding the aggregate area of which does not exceed three and one-eighth acres. To the facts of the present case rr. 127 to 132 are applicable R. 157 says that—

“157. Before making a division the court shall—

(a) determine separately the share of the plaintiff and each of the other co-tenure-holders,

(b)

(c) make valuation of the holding or holdings in accordance with the rent-rate applicable to each plot in the holding, and

(d) determine separately the value of the share of the plaintiff and each of the other co-tenure-holders."

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Under this rule the share of each co-tenure-holder is determined and its valuation is fixed. It is thus clear that in view of these statutory provisions a suit for the division of a holding under s. 176 of the Act, expressly involves division of the land revenue payable on the holding. The plaintiff has no choice in the matter. If he wants to avoid the separation of the land revenue of the holding, the suit could not be validly decreed. In this view of the matter it is clear that the decisions of the Calcutta High Court and Patna High Court are not applicable to a suit under s. 176 of the Act. In view of the Division Bench decision of our Court mentioned above the civil court had no jurisdiction to pass the final decree even though it was based upon a compromise between the parties. That decree was without jurisdiction and hence not enforceable.

In the next place it was submitted that the compromise application which was the subject-matter of the decree would operate as a family arrangement. This is a mixed question, requiring several facts. No such plea was taken at any stage. Even a copy of the compromise application has not been annexed with the writ petition. We do not know its contents. There is no allegation in the writ petition that there was any

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pre-existing dispute between the family members which was settled by the compromise. The compromise for partition cannot as a matter of law operate as a family arrangement. In the circumstances, the appellants cannot successfully raise this plea for the first time in the special appeal.

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It was next urged that in title proceedings under the U. P. Consolidation of Holdings Act the matter had gone to the Deputy Director of Consolidation and he held that the partition decree passed by the civil court was binding. It is well settled that in order to establish a plea of *res judicata* it is necessary to file a copy of the decree or judgment on which such a plea is based. The copy of the judgment of the Deputy Director of Consolidation has not been filed and as such this plea cannot be entertained. Reference has been made to a passing observation in the judgment of the Settlement Officer (Consolidation) that "even the learned Deputy Director in his judgment has held that the decree had the binding effect on the contesting parties". But that cannot constitute a valid basis for the plea of *res judicata*, for the additional reason that this point was not taken as such in the writ petition or in the grounds of appeal. It is noticeable that the Settlement Officer (Consolidation) did not himself accept the plea that the partition decree was binding. If the plea had been taken at the appropriate stage the parties may have produced material and alleged facts in rebuttal.

In the end Mr. Chaudhary urged that the consolidation authorities have made a mistake of calculation in making allotment of chaks. This again is a point which does not appear to have been raised before the learned single Judge and we cannot entertain it for the first time in special appeal. If there was any error in

the calculation of the shares it was always open to the parties to approach the Settlement Officer and ask him to correct that mistake if the mistake is clerical or accidental in nature.

The various points raised in support of this appeal fail. The appeal is accordingly dismissed with costs.

Appeal dismissed.

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RESPONDENTS.

Special Marriage Act, 1872, s. 16—Second Marriage during the lifetime of first wife not void.

The act of marriage, a second time, during the lifetime of the first wife married under the Act might have been an offence under s. 16 of the Act and the husband might have been prosecuted for the same but from this it does not follow that the second marriage which was a valid marriage having been performed according to Hindu customary rites became void. S. 16 did not declare such subsequent marriage void.

Second Appeal no. 2326 of 1965 from the judgment and decree of A. C. BANSAL, 1st Additional District Judge, Allahabad, dated 28th April, 1965 in Civil Appeal no. 44 of 1964.

R. C. Ghatak, for the Appellant.

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K. P. Bose, Sharafat Ali and A. Banerji, for the Respondents.

T. S. MISRA, J.:—This is a plaintiff's appeal arising out of a suit for possession and recovery of damages from the defendants. The plaintiffs alleged that the house in suit was owned by her husband M. P. Chatterji. The marriage of the plaintiff no. 1 with M. P. Chatterji was performed under the provisions of the Special Marriage Act, 1872 and out of this wedlock the plaintiffs nos. 2 to 4 were born. Subsequently M. P. Chatterji developed illicit connections with the defendant no. 1 and both of them started living in a separate house. The defendants nos. 2 to 6 are the sons of the defendant no. 1. The plaintiff contended that the defendant no. 1 was not legally married with M. P. Chatterji and M. P. Chatterji died in the year 1959 and the plaintiffs claimed themselves to be his heirs and legal representatives. The defendants reside on the first floor of the house which was purchased by M. P. Chatterji and the plaintiffs have sought for their eviction therefrom.

The suit was contested by the defendants. They alleged that plaintiff no. 1 was a legally wedded wife of late M. P. Chatterji. On the other hand, the defendant no. 1 was not his legally wedded wife and as such the defendants being the heirs and legal representatives of M. P. Chatterji have right, title and interest in his property including the house in suit. Consequently, it was pleaded that the plaintiffs were not entitled to seek the eviction of the defendants. They also pleaded that a settlement had taken place between the parties to the suit and in that view of the matter as well the suit was not maintainable.

The trial court, on a consideration of the evidence, found that the plaintiff no. 1 was married to M. P.

Chatterji and that marriage was performed under the provisions of Special Marriage Act, 1872 and that the plaintiffs nos. 2 to 4 are the sons and daughters of late M. P. Chatterji. The trial court also held that the defendant no. 1 was also married to M. P. Chatterji according to Hindu rites and her marriage was valid. Consequently it was held that defendant nos. 2 to 6 are the legitimate sons and daughters of M. P. Chatterji. It was however, held that no settlement between the parties, as pleaded in the written statement, took place between the parties. At the same time it was held that the defendants had share in the house in dispute and the plaintiffs were not entitled to any damages or to the relief of ejectment as both the parties to the suit were co-owners. The suit was accordingly dismissed. This plaintiffs thereupon filed an appeal. The appellate court below concurring with the findings recorded by the trial court dismissed the appeal. The plaintiffs have now come to this Court in second appeal.

The learned counsel for the plaintiff contended that the marriage of M. P. Chatterji with the plaintiff no. 1 having been performed under the provisions of the Special Marriage Act, 1872. M. P. Chatterji was prohibited from marrying the defendant no. 1 during the lifetime of his first wife, namely, the plaintiff no. 1, in view of s. 16 of the Special Marriage Act. He argued that under s. 16 of the said Act a person marrying under this Act, who during the lifetime of his wife, contracts another marriage was subject to the penalties provided in ss. 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of his wife. As M. P. Chatterji married the defendant no. 1 during the life time of the plaintiff no. 1 he committed an offence under s. 16 of the Act. The act of marrying being an offence was thus prohibited by law and as such the marriage of M. P. Chatterji with Smt. Kamala

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Banerji was void. It was argued on behalf of the appellants that an act which is an offence is illegal and prohibited by law. The act of marrying again during the lifetime of the plaintiff no. 1 being an offence was illegal and unlawful and as such the marriage of M. P. Chatterji with Smt. Kamala Banerji was void. She, therefore, was not entitled to inherit the properties left by M. P. Chatterji. I find no force in this contention. S. 16 of the Special Marriage Act of 1872 is as follows:

"Every person married under this Act who during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in ss. 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage."

The following are the ingredients of s. 16 of the Act: (1) the first marriage of a person must have been performed under the provisions of the Special Marriage Act; (2) during the lifetime of his wife that person contracts another marriage; (3) by contracting another marriage he commits an offence; and (4) he thereby subjects himself to the penalties provided in ss. 494 and 495 of the Indian Penal Code. The first three ingredients mentioned above must exist in order to attract the provisions of s. 16 of the Act. The second marriage must have been performed during the lifetime of the first wife and that second marriage must be a valid marriage. If the second marriage is not a valid marriage the person concerned cannot be deemed to have committed an offence under s. 16 of the Act. The offence is provided in s. 16 whereas the penalties to which the person concerned would be subject are those which are provided in ss. 494 and 495 of the Indian

Penal Code. The clause 'contracts any other marriage' obviously means contracts any other valid marriage. If the second marriage was not valid it would be no marriage in the eye of law and in that event it cannot be said that the person concerned had contracted another marriage during the lifetime of his first wife. A marriage of a Hindu to be valid must be performed in accordance with Hindu rites and the Hindu law applicable to the parties concerned at the relevant time. In the instant case both the courts below have found that the first marriage of M. P. Chatterji with the plaintiff no. 1 was solemnised under the provisions of the Special Marriage Act. The courts below also found that during the lifetime of the plaintiff no. 1 M. P. Chatterji again married Smt. Kamala Benerji, the defendant no. 1, and that second marriage was performed according to Hindu rites. The defendant no. 1 and M. P. Chatterji thereafter lived together as husband and wife and the defendants nos. 2 to 6 were born out of that wedlock. The marriage of Smt. Kamala Benerji with M. P. Chatterji having been performed in accordance with Hindu rites was valid. The learned counsel for the appellants urged that as M. P. Chatterji contracted another marriage during the lifetime of plaintiff no. 1, the second marriage was void as it was prohibited by s. 16 of the Act. This contention ignores a very important aspect. It is nowhere provided in s. 16 of the Act that the second marriage contracted during the lifetime of the first wife is void. In this connection it would be worthwhile to notice the provisions of s. 15 of the Act which stipulate that every person who being at the time married, procures a marriage of himself to be solemnised under this Act shall be deemed to have committed an offence under s. 494 or s. 495 of the Indian Penal Code, as the case may be, and the marriage so solemnised is void. Thus not only a penalty on married

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person marrying again under the Act was provided by s. 15 but the marriage so solemnised was declared void by the statute. S. 16 does not declare specifically that the second marriage contracted by the person who is already married under the Act shall be void if that second marriage was contracted during the lifetime of his first wife. It is also significant to note that under s. 15 of the Act it is provided that the person concerned shall be deemed to have committed an offence under s. 494 or s. 495 of the Indian Penal Code. It means that a person who procures a marriage of himself to be solemnised under the Act though he was already married would commit an offence under s. 494 or s. 495 of the Indian Penal Code and shall be liable to be prosecuted for the same. However, s. 16 does not provide that the person who marries second time during the lifetime of his first wife shall be deemed to have committed an offence under s. 494 or s. 495 of the Indian Penal Code. If he does so he would be committing an offence of marrying again under s. 16 of the Act, itself. The penalty to be imposed on him would be that which is provided in ss. 494 and 495 of the Indian Penal Code. The act of carrying again during the lifetime of the first wife is made an offence under s. 16 of the Act under s. 494 the second marriage must be void by reason of the law applicable to the person violating the provisions of s. 494. S. 495 of the Indian Penal Code provides a higher penalty when the fact of first marriage is concealed from the person with whom the subsequent marriage is contracted. A Hindu marriage is not a contract but a sacrament. It becomes complete and binding the moment it is performed and solemnised in accordance with the customary rites and ceremonies of either party thereto. S. 16 as pointed out earlier, does not declare the second marriage void if it was performed during the lifetime of the first wife, who was married

to the person concerned under the provisions of the Special Marriage Act. In this connection reference may also be made to s. 44 of Special Marriage Act, 1954 and s. 17 of the Hindu Marriage Act, 1955. S. 17 of the Hindu Marriage Act provides that any marriage between two Hindus solemnised after the commencement of that Act is void if at the date of such marriage either party had a husband or wife living and the provisions of ss. 494 and 495 of the Indian Penal Code shall apply accordingly. Similarly s. 44 of Special Marriage Act, 1954 also stipulates that if a person already married under the provisions of the Special Marriage Act, 1954 contracts any other marriage during the lifetime of his first wife shall be subject to the penalties provided in ss. 494 and 495 of the Indian Penal Code and the subsequent marriage shall be void. No such provisions declaring the subsequent marriage void is, however, to be found in s. 16 of the Special Marriage Act of 1872. In the absence of any such provision the second marriage validly performed and solemnised cannot be held to be void. The marriage of M. P. Chatterji with Smt. Kamala Benerji, having been performed in accordance with Hindu rites and the law prevalent amongst them did not become void because of the fact that it was solemnised during the lifetime of the plaintiff no. 1. Sri M. P. Chatterji by marrying the defendant no. 1 during the lifetime of the plaintiff no. 1 might have committed an offence and might have been prosecuted for the same under s. 16 of the Act but that is quite a different matter. The learned counsel for the appellant referred to the various decisions, namely, page 846, English Reports 150, page 717, 10 English Reports 90, page 750, English Reports 131, Reports (H. L.), page 1326, A. I. R. 1959 S. C. 781: A. I. R. 1930 Allahabad 1 and A. I. R. 1946 Mad. 446 to substantiate his contention that an act which is an offence is illegal and prohibited by law. There is no

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dispute about the principles laid down in those decisions. The act of Sri M. P. Chatterji, marrying second time during the lifetime of plaintiff no. 1 might have been an offence under s. 16 of the Act and he might have been prosecuted for the same but from this it does not follow that the second marriage with the defendant no 1, which was valid having been performed according to the customary Hindu rites became void. S. 16 of the Act did not declare such subsequent marriage void.

The learned counsel then argued that as the marriage of M. P. Chatterji with the plaintiff no. 1 was performed under the provisions of Special Marriage Act, 1872 the succession to his property would be governed by the provisions of the Indian Succession Act and the plaintiffs alone would be entitled to succeed to his properties. He contended that defendant no. 1 would not be included within the terms 'widow' as mentioned in the Indian Succession Act. He also contended that as the marriage of defendant no. 1 was void, she could not be held to be a widow of M. P. Chatterji. I do not find any substance in these contentions. The marriage of M. P. Chatterji with defendant no. 1 was valid and not void. He died intestate on 2nd October, 1959. Both the plaintiff no. 1 and the defendant no. 1 are his widows. In view of the provisions of s. 24 of the Special Marriage Act, 1872, the succession to his property would be regulated by the Indian Succession Act. As he had left behind lineal descendants as well the provisions of s. 33 of the Indian Succession Act would be attracted. The Special Marriage Act, 1872 does not declare the second marriage of a person contracted during the lifetime of his first wife as void, nor does it provide that the lady whose marriage was solemnised under the provisions of the Special Marri-

age Act, 1872 alone would be regarded as 'widow' for the purposes of inheritance. No such exception is provided even in the Indian Succession Act. That being so, the term 'widow' in s. 33 of the Indian Succession Act should include 'widows' as the singular should include the plural. Consequently the property of Sri M. P. Chatterji devolved on the plaintiff no. 1, defendant no. 1 and his lineal descendants. The defendants cannot, therefore, be evicted from the house in suit as trespassers nor can they be held liable to pay damages. The suit for their ejectment and recovery of damages was therefore rightly dismissed. No other point was urged.

In the circumstances the appeal fails and is accordingly dismissed. However, in view of the peculiar circumstances of the case the parties shall bear their own costs of this appeal.

Appeal dismissed.

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v.

BANSHI AND OTHERS ... RESPONDENTS.

U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 20(a)(ii)—Usufructuary mortgage—Mortgagee not a sub-tenant—Liable to be ejected.

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A usufructuary mortgagee does not acquire the status of a sub-tenant. He is entitled to remain in possession as a person who has a right to occupy subject to the covenants of the transaction. Such a transaction does not make the mortgagee a sub-tenant within the meaning of various tenancy Acts. The term of contract between the parties is essentially only to transfer the actual occupation on an agreement that the occupation would cease on the principal amount being paid. He does not become an *Adhivasi*.

Special Appeal no. 223 of 1966 from the judgment and order of S. N. SINGH, J. in Civil Miscellaneous Writ Petition no. 1449 of 1963 decided on 28th February, 1966.

K. C. Saxena, for the Appellant.

N. L. Gangoli, for the Respondent.

S. CHANDRA, J.: This appeal arises out of a suit for ejectment under s. 202 of the U. P. Zamindari Abolition and Land Reforms Act on the footing that the defendant appellant was an *asami*.

The plaintiff alleged that his ancestors had usufructually mortgaged the plots in dispute with the ancestors of the defendants under a document dated 21st July, 1869 for a sum of Rs.50. The plaintiff wanted to reclaim possession and to that end he deposited the mortgage money of Rs.50 in court. The principal defence was that on the expiry of sixty years' period from the date of mortgage the same came to end and, therefore, the plaintiff could not claim the equity of redemption. The status of the defendants changed thereafter to hereditary tenants. Hence, they were not liable to be ejected as *asamis*.

The trial court accepted the defence and dismissed the suit. The findings were, however, reversed on appeal where the suit was decreed. The appellate decree was confirmed by the Board of Revenue and also by a learned single Judge of this Court who dismissed the writ petition filed by the appellant.

The principal plea raised before us was that the usufructuary mortgage dated 21st July, 1869 was a valid transaction to which Art 148 of the Limitation Act applied and, as such, after the expiry of sixty years' period the equity of redemption extinguished and the relationship of mortgagor and mortgagee came to an end. The plaintiff hence could not sue on the footing that the defendants were still mortgagees in possession.

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In 1869 Recovery of Rents (Bengal) Act, 1859 (Act X of 1859) was in force. Before us there is a controversy whether this Act was applicable to the district of Banaras where the land in dispute was situate. This Act has been designated as "Recovery of Rents (Bengal) (Act X of 1859) Act in the commentary upon the Zamin-dari Abolition and Land Reforms Act by Mr. B. S. Shukla, Vol. II, p. 317. Here the laws repealed by this Act are mentioned. This Act repealed several regulations and Acts. For instance, it repealed ss 9 and 10 of Regulation 51 of 1795 respecting *ryotty potthas* in the province of Banaras. It also repealed ss. 1 to 20 of Regulation 5 of 1800 in respect of the erstwhile province of Banaras. In *Gopal Pandey v Purshottam Das* (1), MAHMOOD J. observed :

"Whatever the rights of tenants may originally have been in these provinces, Act X of 1859 was the first legislative enactment which recognised or conferred the right of occupancy upon cultivators who had occupied their holdings for twelve years and upwards."

He also observed that under s. 6 of this Act as held by a Full Bench of the Calcutta High Court in *Narenāra Narain Roy Chaudhry v. Ishan Chandra Sen* (2) that the right of occupancy was not transferable; that it was a right to be enjoyed by the person who held or

(1) I.L.R. 5 All. 121.

(2) 13 B.L.R. 288.

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cultivated and paid the rent and had done so for a period of twelve years. He also observed that it was held both by this Court and by the High Court of Calcutta that local custom would entitle the occupancy tenant to transfer his holding.

These observations shows that this Act extent and applicable in the district of Banaras. The mortgage in the instant case was of the year 1869 when the Act of 1859 was in force. In our view that Act could govern the parties. A learned single Judge of this Court in the case of *Biswanath Singh v. Sunder* (1) held that the Act of 1859 was applicable in this State.

In this case it has further been held that the consensus of view was that the rights of occupancy tenant governed by the 1859 Act were not transferable except under a custom.

The position, therefore, seems to be that the same position obtained in these provinces under the Act of 1859 as it did under the Act of 1881, which was the subject-matter of decision by a Full Bench in the case of *Khiali Ram v. Nathulal* (2). On a review of the various legislative enactments and decisions of this Court it was held in the case of *Barhu Singh v. Kharpattu* (3):

“A usufructuary mortgage of an occupancy holding created when the N. W. P. Act No. XII of 1881 was in force, must be treated as a valid transaction, but in a qualified sense, i.e. in the sense of subletting with a covenant that the mortgagor will not be entitled to recover possession without payment of the mortgage money ; and further that a transfer of the occupancy holding was not created by the mortgage but a mere right to occupy the holding

(1) 1902 R.D. 321.

(2) I.L.R. 15 All. 219 (F. B.).

(3) 1956 A.L.J. 87.

was created upon certain covenants. In this view of the matter it must be held that the mortgagee of an occupancy holding under the Rent Act of 1881 would have no right to claim extinguishment of the mortgagor's interests in the property by the enforcement of the rights created by the mortgage. If the mortgagee does not get any interest in the occupancy holding, he cannot claim to obtain that interest by expiry of the period of limitation fixed for the redemption of the mortgage. The right of redemption of the mortgagor in an usufructuary mortgage of this nature will therefore not be deemed to have become barred by lapse of time under Art. 148 of the Limitation Act, and the mortgagor can institute a suit for possession at any time upon payment of the mortgage money, because his cause of action for recovery of possession would accrue upon his demand for possession upon payment of the mortgage money and refusal thereof by the mortgagee."

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This view was carried to a logical conclusion by a Full Bench of this Court in *Samharu v. Dharmraj Pandey* (1). While interpreting s. 21(1)(d) of the U. P. Zamindari Abolition and Land Reforms Act it was held that the word 'mortgage' has been used in s. 21 (1) (d) of the U. P. Zamindari Abolition and Land Reforms Act in a comprehensive or a loose sense and the expression is not confined only to a valid mortgage. The effect of these authorities is that a transaction of the kind involved in the present case was not a mortgage property so called, but yet was a mortgage within meaning of s. 21 (1) (d) of the U. P. Zamindari Abolition and Land Reforms Act.

Mr. Saxena for the appellant urged that since it has been held that the transaction was in a sense one of sub-

(1) 1969 A.L.J. 949 (F. B.).

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letting the appellant became a sub-tenant and was entitled to *adhivasi* rights under s. 20 (a) (ii) of the Zamin-dari Abolition and Land Reforms Act, and that the authorities mentioned above treat the transaction of mortgage as one of sub-letting with an added covenant that he would be entitled to remain in possession till the mortgage money was paid. It will be seen that in none of the cases cited above, it has been held that the mortgagee acquires the status of a sub-tenant. He is entitled to remain in possession as a person who has a right to occupy subject to the covenants of the transaction. None of the decided cases have held that such a transaction makes the mortgagee a sub-tenant within the meaning of various tenancy Acts. The reason is not far to seek. Under a contract of sub-tenancy, the sub-tenant is liable to pay rent to the tenant-in-chief. Under the transaction of a mortgage, the mortgagee is not liable to pay rent to the mortgagor. The liability to pay rent never accrues. The term of contract between the parties is essentially only to transfer the actual occupation on an agreement that the occupation would cease on the principal amount being paid. Secondly, unlike a sub-lease, in such mortgage no interest in the holding passes. Such a transaction has been designated as being of the nature of sub-letting, loosely with a view to take it outside the category of transfers to which the prohibitory provisions of the various tenancy acts apply. We are hence, unable to sustain the plea that the appellants would become *adhivasis* of the land on the footing that they were sub-tenants on the date immediately preceding the date of vesting.

We see no merit in the appeal which is accordingly dismissed with costs.

Appeal dismissed.

CIVIL MISCELLANEOUS (F. B.)

Before Mr. Justice S. Chandra, Mr. Justice J. S. Trivedi
and Mr. Justice N. D. Ojha

ABDUL WAHAB

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DISTRICT MAGISTRATE

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... RESPONDENTS.

U. P. Panchayat Raj Act, 1947, s. 95(1)(g)—Removal of Pradhan from office—Proceeding for—Affects his rights and involves civil consequences—Principles of natural justice applicable to such enquiry.

Principles of natural justice fully apply even if the enquiry is administrative in nature, provided it affects the rights of the charged officer and involves civil consequences. A proceeding for the removal of a Pradhan from the office to which he was elected clearly affects his rights and involves civil consequences upon him. Such an enquiry can only be made consistently with the principles of natural justice.

Held, on facts, that principles of natural justice were complied with in this case.

Ved Singh v. Assistant Sub-Divisional Officer (1) over-ruled.

Hari Chand v. State of U. P. (2) approved.

Civil Miscellaneous Writ Petition No. 2753 of 1969.

S. B. Johari, for the Petitioner.

S. C., for the Respondents.

N. D. OJHA, J.:—The Petitioner was Pradhan of Gaon Sabha Jamdashahi in the district of Basti. He was removed from that office under s. 95 (1) (g) of the U. P. Panchayat Raj Act by the Sub-Divisional Officer, Basti, on May 6, 1969. An appeal filed by the petitioner to the District Magistrate, Basti, filed on August 5, 1969. Thereupon the present petition was filed with the prayer to quash the aforesaid two orders passed by the

(1) A.I.R. 1965 All. 870.

(2) 1970 A.W.R. 48 (H. C.).

1972 Sub-Divisional Officer, Basti and the District Magistrate, Basti respectively. The writ petition came up for hearing before a learned single Judge and it was pressed on only one ground, namely that the impugned order dated May 6, 1969 passed by the Sub-Divisional Officer, Basti was in contravention of the principles of natural justice. The learned single Judge felt that there was a conflict in two Division Bench decisions of this Court reported in *Ved Singh v. Assistant Sub-Divisional Officer* (1) and *Hari Chand v. State of U. P.* (2) and he accordingly referred the case to a Full Bench and the writ petition has thus come up before us.

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The learned counsel for the petitioner has attacked the order of removal of the petitioner even before us only on one ground, namely that it was passed in violation of principles of natural justice. The facts of the case shorn of unnecessary details are in a narrow compass. A complaint was made to the Sub-Divisional Officer by one Bipat Husain and three others bringing to his notice certain illegal acts said to have been committed by the petitioner in the discharge of his duties as a Pradhan and the petitioner was accused of having abused his position as a Pradhan. The Sub-Divisional Officer directed the Tahsildar to make enquiry into the complaint and to submit report. The Tahsildar in his turn passed on the complaint to the Naib-Tahsildar for making an enquiry into the allegations made therein. A similar complaint made to the Chief Minister also reached the Naib-Tahsildar for enquiry in due course. The Naib-Tahsildar recorded the statement of the petitioner and of certain other persons including the complainant Bipat Husain and submitted his report. Thereafter a charge-sheet was drawn up by the Sub-Divisional Officer and the petitioner was required to submit his

(1) A.I.R. 1965 All. 370.

(2) 1970 A.W.R. 48 (H. C.)

explanation to the charges as also to give a list of the witnesses whom he proposed to examine in defence and also to mention the name of those persons whom the petitioner wanted to cross-examine. According to the petitioner he made an application to the Sub-Divisional Officer for being supplied with the copies of the complaint made by Bipat Husain, report of the Naib-Tahsildar and the statements of the witnesses recorded by the Naib-Tahsildar, but he was supplied only with a copy of the report of the Naib-Tahsildar. The petitioner submitted his explanation and towards the end of it, it was also mentioned that he would press and request for his right to cross-examine the witnesses on whose statements reliance was sought to be placed against him and also to adduce oral evidence of witnesses whose list would be submitted in due course. Certain proceedings took place after the explanation was furnished and ultimately the Sub-Divisional Officer fixed October 11, 1968 for evidence. As appears from the copy of the order sheet dated October 11, 1968 which has been attached as Ann 'B' to the counter-affidavit of Adya Prasad Tripathi the Naib-Tahsildar who conducted the enquiry, a statement was made on behalf of the petitioner that he did not desire to produce any oral evidence and only wanted to have an opportunity of personal hearing. The Sub-Divisional Officer fixed October 28, 1968 for personal hearing. On the said date the petitioner appeared along with his counsel and the order-sheet of that date indicates that it was agreed (*ab yeh tai paya gaya*) that now the petitioner would have no personal hearing and November 2, 1968 was fixed for arguments. Arguments could not be heard on November 2, 1968 and the case was adjourned to November 18, 1968. Bipat Husain in the meantime seems to have made an application to the District Magistrate complaining that no evidence was being re-

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corded against the petitioner and that both the parties may be given adequate opportunity for producing evidence. An order was passed by the District Magistrate on November 16, 1968 to the effect that the Sub-Divisional Officer will take evidence of both the parties and then after hearing them, if they so wished, pass necessary orders according to law. It appears that in pursuance of the said order the Sub-Divisional Officer on November 18, 1968 which was the date fixed in the case required the petitioner as well as Bipat Husain to submit a list of their witnesses. Bipat Husain submitted two lists of witnesses, but the petitioner did not submit any. On February 13, 1969 statement of Bipat Husain was recorded in part and March 1, 1969 was fixed for further evidence. On the said date, however, neither Bipat Husain nor the petitioner appeared and the Sub-Divisional Officer fixed March 27, 1969 for arguments. On some application made by Bipat Husain the Sub-Divisional Officer passed an order on March 19, 1969 to the effect that the witnesses had already been examined in enquiry proceedings and there is no need to call them for fresh examination. Arguments could not be heard on March 27, 1969 and April 2, 1969 was fixed in the case. Bipat Husain seems to have in the meantime again made some application to the District Magistrate and the District Magistrate seems to have asked the Sub-Divisional Officer to take necessary action. Neither a copy of the said application nor the order passed thereon by the District Magistrate has been filed and it is not, therefore, possible to ascertain their contents but presumably acting upon the order that may have been passed by the District Magistrate the following order was passed by the Sub-Divisional Officer on April 2, 1969:

“Proceeding has been pending since long. Witnesses to be cross-examined by the Pradhan under

suspension have not been produced on dates fixed. In case the applicant wants to produce the witnesses he should produce them on April 12, 1969, the last date for purpose. In case the Pradhan wants or does not want to cross-examine them, will be determined on that date."

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Bipat Husain produced 13 witnesses on April 12, 1969 who were tendered for cross-examination but the petitioner's counsel declined to cross-examine them. Thereafter April 21, 1969 seems to have been fixed in the case and ultimately the impugned order removing the petitioner was passed on May 6, 1969.

Learned counsel for the petitioner has made three submissions:

(1) that the petitioner was not given adequate and reasonable opportunity by the Sub-Divisional Officer to defend himself;

(2) that the orders passed by the District Magistrate when proceedings were still going on before the Sub-Divisional Officer amounted to undue interference with the proceedings which had the effect of vitiating the proceedings; and

(3) that neither the witnesses were examined by the Naib-Tahsildar in presence of the petitioner nor were copies of statements supplied to him with the result that the opportunity which was given to him to cross-examine the said witnesses was illusory;

On the basis of these submissions it is urged that the principles of natural justice were violated.

Before considering the question in regard to the scope of the principles of natural justice which may be held applicable it will be necessary to record a finding on the questions of fact raised in the case inasmuch as the findings so arrived at would constitute the basis

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for the determination of the question as to whether in the instant case the principles of natural justice were violated and, if so, in what manner?

So far as the petitioner's grievance that he was not afforded adequate and reasonable opportunity to produce any evidence in defence is concerned we find no difficulty in holding that the complaint made by the petitioner in this behalf is wholly unfounded. As would appear from the order-sheet of October 11, 1968 and October 28, 1968 a true copy of which has been filed as Annexure 'B' to the counter-affidavit of Adya Prasad Tripathi, it was specifically stated on behalf of the petitioner on October 11, 1968 that he only wanted to have a personal hearing and did not desire to produce any oral evidence. On October 28, 1969 his counsel was heard and it was agreed that the petitioner did not want any personal hearing. From the facts stated above it would appear that after these two dates no such evidence was recorded which was used against the petitioner and, therefore, there was no occasion for granting the petitioner any further opportunity of rebuttal.

The submission on behalf of the petitioner that the proceedings were vitiated on account of any interference by the District Magistrate is also without any substance. It is true that on an application made by Bipat Husain the District Magistrate on November 10, 1968 directed the Sub-Divisional Officer to take evidence of both the parties but except recording the statement of Bipat Husain in part no other statement of any witnesses was recorded by the Sub-Divisional Officer and from the other of the Sub-Divisional Officer dated May 6, 1969 it does not appear that any reliance was placed on that part of the statement of Bipat Husain which was so recorded. So far as the second application made by Bipat Husain to the District Magistrate is concerned neither a copy of the

said application has been filed nor a copy of the order passed thereon, and it is not possible to ascertain their contents. Moreover, in pursuance of the said order the petitioner himself was given additional opportunity to cross-examine the witnesses that were examined by the Naib-Tahsildar which opportunity the petitioner declined to avail of and in these circumstances it cannot be said that the proceedings in any way were vitiated by the two orders referred to above passed by the District Magistrate.

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Now we proceed to consider the last submission made on behalf of the petitioner that the Naib-Tahsildar examined the witnesses behind the back of the petitioner and that the copies of their statements were not given to the petitioner with the result that the opportunity given to cross-examine those witnesses was illusory. A true copy of the explanation which was submitted by the petitioner in reply to the charge-sheet has been attached as Ann. 'III' to the writ petition wherein it has been admitted that a copy of the report of the Naib-Tahsildar had been given to him. The copy of the report of the Naib-Tahsildar which was so given to the petitioner has, however, not been filed. An uncertified copy of the said report was, however, produced by the petitioner's counsel for our perusal at the time of hearing alongwith a copy of the notice which was given by the Naib-Tahsildar on December 13, 1967 to the petitioner. From a perusal of the copy so produced before us it appeared that to the report of the Naib-Tahsildar were annexed various documents including the complaints made against the petitioner and the statements of the witnesses examined by the Naib-Tahsildar. The notice dated December 13, 1967 given by the Naib-Tahsildar to the Petitioner stated that the Naib-Tahsildar wanted to make enquiry on December 17, 1967 upon the application made by Fida'

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Husain and others residents of village Jamdashahi against the Pradhan. The Pradhan was required to be present at Jamdashahi at 9.00 o'clock on the said date along with all the papers of the Land Management Committee.

The petitioner was the Pradhan of Gaon Sabha, Jamdashahi and from the aforesaid notice it was clear that the proceedings in connection with the enquiry made by the Naib-Tahsildar on December 17, 1967 were held at village Jamdashahi itself. It is admitted to the petitioner in para. 5 of the writ petition that his statement was recorded by the Naib-Tahsildar on December 17, 1967, but he asserts that no other proceedings were taken in that connection on that date. When a complaint containing serious charges against him was being inquired into in the village itself after proper notice to the Pradhan and the statements are recorded during such enquiry it does not appeal to reason that the petitioner after giving his statement became oblivious of the further proceedings that took place thereafter. Adya Prasad Tripathi the Naib-Tahsildar who conducted the enquiry has himself filed a counter-affidavit. In para. 5 of this counter-affidavit it has been stated on personal knowledge that the statements of some witnesses were also recorded on that date. It has further been stated that statements of some witnesses were recorded on December 25, 1967 and that all the statements were recorded in the presence of the petitioner. It has also been stated in the said paragraph that on December 25, 1967 the petitioner made a statement duly signed in Urdu that he did not want to give statement immediately and that he will do so in Basti on December 27, 1967 and that in spite of various opportunities being given to him thereafter the petitioner did not either give any statement or produce any documentary evidence. A true copy of the statement of the petitioner made on

December 25, 1967 has been filed as Annexure 'A' to the counter-affidavit and the statement as recorded by the Naib-Tahsildar reads thus:

"Sri Abdul Wahab Pradhan

Aap is samai sabut nahin dena chahte. Aap kahte hain ki Basti men sabut doonga. Atah Dinank 27-12-'67 ko apna sabut Fida Husain ki dar-khowast ke sambandh men tahsil men upasthit ho kar mere samaksh den.

A. Pra. Tripathi,

Na. Ta.

25-12-'67.

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In para. 6 of the rejoinder-affidavit which contains the reply, of para. 5 of the counter-affidavit it has not been specifically stated that the petitioner did not make any such statement and that the statement as filed along with the counter-affidavit does not contain his signature. The relevant averment in this behalf in paragraph 6 of the rejoinder-affidavit reads thus:

"It is wrong to say that on 25-12-67 the deponent wanted time to give his statement on 27-12-67, and in fact no such question arises as the deponent had already been examined on 17-12-67."

It would appear that without denying the fact of making statement under his signature a technical objection was sought to be raised in the rejoinder-affidavit based on the word "statement" used in para. 5 of the counter-affidavit. As would be clear from Ann. 'A' to the counter-affidavit what was stated was that the petitioner did not want to adduce evidence in his defence (*sabut*) on December 25, 1967 and that he would give the same at

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Basti. Obviously of the word "statement" in para. 5 of the counter-affidavit has to be read in that context. It would thus appear that the petitioner had no courage to deny the fact that he did not make any such statement on December 25, 1967 as alleged in the counter-affidavit but only tried to take shelter on a hair-splitting interpretation of the word "statement". In view of what has been observed above we have no hesitation in accepting the facts stated in para. 5 of the counter-affidavit, namely that the statements of witnesses both on December 17, 1967 and December 25, 1967 were recorded in the presence of the petitioner and that the petitioner notwithstanding the fact that he was given various opportunities by the Naib-Tahsildar to enter defence did not avail of those opportunities. This conclusion finds further support from the explanation given by the petitioner to the charge-sheet. Relevant portion of the explanation reads thus:

"In his eagerness to insist his enquiry with a certain amount of sanctity the learned N.T. even crossed the limits of illegality and put the witnesses as also me, an accused, on oath. It is common knowledge that oath is not only quite out of place in a preliminary enquiry of this type, but also goes to prejudice a fair and impartial assessment of the accusation made".

According to the petitioner when this explanation was submitted by him he had not been supplied with the copies of the statements of the witnesses and had been supplied only with the report of the Naib-Tahsildar. We asked the learned counsel for the petitioner to point out anything from the copy of the report of the Naib-Tahsildar produced before us which may indicate that the statements of the witnesses were re-

corded on oath. The learned counsel was, however, unable to point out any such thing and it is obvious that unless the statements were recorded in the presence of the petitioner he could not have known that these statements were recorded on oath.

In view of the finding that the statements of the witnesses were recorded in the presence of the petitioner the assertion that the copies of their statements were not furnished to the petitioner loses its significance. We may, however, point out that there is no assertion in the writ petition that the copy of the report of the Naib-Tahsildar which was supplied to the petitioner was an incomplete copy. As observed above the copy of the report of the Naib-Tahsildar produced before us indicated that the complaints made against the petitioner and the statements of the witnesses examined by the Naib-Tahsildar were annexed to the said report and it can be presumed that the copy of the report of the Naib-Tahsildar which was supplied to the petitioner contained these annexures. The conduct of the petitioner in not filing the copy of the report as supplied to him gives rise to an inference against the petitioner. The following extract from the explanation of the petitioner supports the inference that copies of the statements of the witnesses and the complaints made against the petitioner were annexed to the copy of the report of the Tahsildar which was furnished to the petitioner:

"I cannot again remain without bringing to your kind notice that the attitude of the Enquiring N. T. had been extremely hostile to me in the course of Enquiry, bordering sometimes on unfairness. He should have, for instance, confined his enquiry to the compass provided by the complaining application made by Bipat and

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others. But in interrogating and recording the statements of witnesses he went out of his way by bringing and introducing charges against me which had no trace in the complaint in writing made against me".

According to the petitioner he had neither been supplied with the copies of the complaints nor of the statements of the witnesses. If that was so it remains unexplained as to how did the petitioner come to know that the Naib-Tahsildar in interrogating and recording the statements of the witnesses went out of his way by bringing and introducing charges against the petitioner which had no trace in the complaint in writing made against him. To us, therefore, it appears that not only the witnesses were examined in the presence of the petitioner but copies of their statements along with copies of the complaints were furnished to the petitioner as part of the report of the Naib-Tahsildar. It may be that the copies of the statements of the witnesses or of the complaints may not have been separately furnished to the petitioner and the assertion of the petitioner in this behalf may be based on this technical view of the matter.

The position hence is that at the preliminary enquiry, the witnesses in support of the charges were examined in the presence of the Pradhan and that he was also furnished a copy of their depositions. But of his own accord, the Pradhan did not choose to cross-examine the witnesses when they were produced for that purpose. According to the Supreme Court, the rules of natural justice require that a party charged should have the opportunity of adducing all relevant evidences on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined

by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them; *Union of India v. T. R. Verma* (1), *Phulbari Tea Estate Co. v. Its Workmen* (2), *Central Bank of India v. P. C. Jain* (3), *T. P. Tripathi v. Board of H. S. and I. Ed.* (4). On facts, these principles were complied with in the present case.

Even where the statement of witnesses are recorded at the preliminary enquiry in the absence of the charged officer, still they are relevant and can be used, if those statements are made available to the delinquent officer and he is given an opportunity to cross-examine those witnesses—*State of U. P. v. Om Prakash Gupta* (5).

A Division Bench in *Harichand v. State* (6) held that where no particular procedure is prescribed, as is the case under s. 95(1)(g) of the Panchayat Raj Act, it would be enough compliance with the principles of natural justice if the charges are fully communicated to the person concerned, the result of the enquiry, if any, is made known to him and the material which is sought to be used against him is disclosed to him and he is afforded adequate opportunity to meet the charges and to lead evidence in rebuttal. In our opinion, this decision lays down the law in accordance with the principles enunciated by the Supreme Court

In *Ved Singh v. Assistant Sub-Divisional Officer* (7), a Division Bench expressed the opinion that in the proceedings for removal of a Pradhan under s. 95(1)(g), the disciplinary authority was not required to act as a Tribunal exercising quasi-judicial functions, and hence in such an enquiry, the applicable principle of natural justice was only that the charged officer should be given an opportunity to explain the charges. There was no necessity to hold a regular trial by examining

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(1) A.I.R. 1957 S.C. 892.

(2) A.I.R. 1959 S.C. 111.

(3) A.I.R. 1969 S.C. 988.

(4) 1972 A.L.J. 515 F. B.

(5) A.I.R. 1970 S.C. 879.

(6) 1970 A.W.R. 48.

(7) A.I.R. 1965 All. 370

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witnesses or allowing the charged officer to cross-examine them. This decision, in our opinion, does not lay down the law correctly.

It has now been ruled by the Supreme Court in *A. K. Kraipak v. Union of India* (1) that the dividing line between an administrative power and a quasi-judicial function is quite thin and is being gradually obliterated. Often it is not easy to draw a line that demarcates administrative enquiries from quasi-judicial enquiries. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. The purpose of the rules of natural justice is to prevent miscarriage of justice. One fails to see why these rules should be made inapplicable to administrative enquiries.

Thus the rules of natural justice are equally applicable, even though the nature and character of the enquiry be held to be administrative.

The Supreme Court in the *State of Orissa v. Dr. Binapani Dei* (2) held that even an administrative order, which involves civil consequences, must be made consistently with the principles of natural justice. The distinction drawn in *Ved Singh's case* (3) that if the enquiry is not quasi-judicial, then the applicable principle of natural justice is merely that the charged officer should be given an opportunity of explaining the charges, in our opinion, displays an incomplete statement of the law. All and the same principles of natural justice fully apply even if the enquiry is administrative in nature, provided it affects the rights of the charged officer and involves civil consequences. A proceeding for the removal of a Pradhan from the office to which he was elected clearly affects his rights and involves civil consequences upon him. Such an

(1) A.I.R. 1970 S.C. 150.

(2) A.I.R. 1967 S.C. 1269.

(3) A.I.R. 1965 All. 370.

enquiry can only be made consistently with the principles of natural justice.

But, as already seen, these principles were complied with in the present case. The appellant cannot have any legitimate complaint in that regard.

In the result, the writ petition has no merits and is dismissed with costs.

Writ petition dismissed.

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APPELLATE CIVIL

*Before Mr. Justice Om Prakash Trivedi**

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v.

RADHEY SHYAM AND OTHERS ... RESPONDENTS.

Court Fees Act, 1870, Sch. II, Art 17(vi)—Court fee—Payment of—In appeal against refusal to pass as instalment decree.

Where the appellant admitted the amount decreed but filed an appeal against the trial court's refusal to grant instalments.

Held; in this case it is difficult to put a money value to the subject-matter of the appeal and as such the case is covered by Art. 17(vi) of the Second Schedule of the Court Fees Act. No *ad-valorem* court-fee on the entire amount decreed is payable in such a case.

Deputy Commissioner, Kheri v. Rama Shantranji Ji (1) and Smt Sardar Devi v. Nihal Karan (2) relied on.

First Appeal No 51 of 1965 against the judgment and order dated 23rd September, 1965 passed by the Court of District Judge, Bahraich in Civil Appeal No. 28 of 1965.

* While sitting at Lucknow.

(1) A.I.R. 1940 Oudh 188.

(2) A.I.R. 1961 Raj. 184.

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U. C. Srivastava, for the Appellant.

Chief Standing Counsel, for the Respondents.

O. P. TRIVEDI, J.:—The only point in this appeal is whether the court-fees paid on the memorandum of appeal is sufficient. The respondent Lala Ram Kumar had filed a suit for recovery of Rs.3,500. The suit was decreed for Rs.1,750 and the parties were directed to pay and receive costs according to their success and failure. The respondent then appealed and paid court-fee of Rs.1.50 paisa on the memorandum of appeal. An objection was taken before the District Judge, Bahraich that the court-fees paid on the memorandum of appeal was insufficient. According to the *objection the advalorem* court-fees should have been paid on the amount decreed, that is, Rs.1,750. The respondent's contention was that he had not contested the amount decreed but had only filed the appeal against refusal to pass an instalment decree by the trial court. It was urged that the appeal could be treated as an objection under s. 47, C. P. C. on which only a court-fees of Re.1.50 paisa was payable. This contention was not accepted by the District Judge and he held that *advalorem* court-fees should have been paid on the memorandum of appeal, the same being valued at Rs.1,750. It is against this order that the present appeal has been filed.

The argument of the learned counsel for the appellant is that court-fees is payable under Art. 17, Sch. II of the Court Fees Act, in force in the year 1965 when the appeal was filed, inasmuch as, according to his submission, it was not possible to estimate the subject-matter of the appeal at a money value. This contention appears supported by decision in the case of *Deputy Commissioner, Kheri v. Raja Shantranji Ji* (1).

(1) A.I.R. 1940 Oudh 188.

It was held in that case that where an appeal does not relate to the amount for which the decree has been passed but to the manner in which the decree can be enforced or executed, the appeal falls under Art 17(vi), Sch. II, Court Fees Act. On facts, which are analogous to the facts of the present case, in the case of *Smt. Sardar Devi v. Nihal Karan* (1) similar view was taken by the Rajasthan High Court. In that case the plaintiff-appellant had instituted a suit and obtained a decree for Rs.11,500 principal *plus* interest at a certain rate up to the date of the institution of the suit and the date of the decree, thereby making a total sum of Rs.12,526.43. Thereafter the decree allowed interest to the appellant at 4½ per cent till realisation on the principal sum remaining due. The decree further allowed payment of the amount in instalments. The petitioner appealed against the decree granting instalments and paid a court-fees of Rs.10 only treating the memorandum of appeal as falling under Sch. II of Art. 17(vi) of the Court Fees Act. Objection was taken to the court-fees paid and it was urged that the appellant was liable to pay court-fees at the *ad valorem* rate on the difference between the amount claimed in appeal and the amount decreed and also on the difference to the appellant between getting his money on the date of the decree under appeal and getting it by instalments as ordered. The contention that *ad valorem* court-fees was payable was not accepted and it was observed that all that the appellant suffers is that instead of getting the amount due at once the payment of the amount is postponed to certain periods by the instalments granted. In that situation the Court held that it is difficult to put money value of the relief claimed by the appellant and held that memorandum of appeal fell under Art. 17(vi) of Sch. II of the Court Fees Act. I am of opinion that in the present case also the appel-

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lant having questioned the trial court's refusal to grant instalments, this is a case where it is difficult to put a money value to the subject-matter of the appeal and the case was covered by Art. 17(vi), Sch. II of the Court Fees Act. Under Art. 17(vi), Sch. II of the Court Fees Act in a suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by the Act, the court-fees payable is Rs.10. The appellant's contention that he was liable to pay court-fee of Re.1.50 paise, the memorandum of appeal being treated as an objection under s. 47, Code of Civil Procedure, is clearly untenable. Therefore, while I do not agree with the lower appellate court's view that *ad valorem* court-fees was payable on the entire amount decreed and hold that it is payable under Art. 17(vi), Sch. II of the Court Fees Act, the court-fees paid appears to be deficient even upon that view by Rs.8.50 paise.

Accordingly, the appeal is partly allowed. The order passed by the lower appellate court, appealed against, is set aside; the appellant is directed to pay the deficient court-fees of Rs 8.50 paise on the memorandum of appeal within a month. The file of this appeal shall be sent down to the court concerned within a week.

Appeal partly allowed.

APPELLATE CIVIL (F. B.)

Before Mr. Justice J. S. Trivedi, Mr. Justice R. L. Gulati and Mr. Justice G. S. P. Singh

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.. APPELLANT,

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KARIM BUX AND OTHERS

... RESPONDENTS.

Code of Civil Procedure, 1908, O. 39, r 9—Attachment before judgment—Dismissal of suit in default—Attachment automatically lapses—No revival of attachment on restoration of suit.

[Per majority, GULATI, J. (*contra*): On the dismissal of suit in default, the attachment before judgment automatically lapses and a fresh attachment is necessary on the restoration of the suit as the previous attachment does not revive.

Second Appeal No. 900 of 1965 from the judgment and decree dated 17th February, 1964 passed by SUSHIL KUMAR, Additional Civil Judge, Moradabad.

Hazi Iqbal Ahmad, for the Appellant.

K. C. Agrawala, for the Respondents.

J. S. TRIVEDI, J.:—This plaintiff's Second Civil Appeal has been referred to the Full Bench on account of the importance of a question of law involved in the case. The question involved is whether on the dismissal of a suit in default the attachment before judgment automatically lapsed and a fresh attachment was necessary on the restoration of the suit, or whether on the restoration of the suit the attachment previously made is revived or is survived.

Smt. Muradan and her husband Nasib Ullah had purchased a house on 16th January, 1947. The plaintiff-appellant had filed a suit for recovery of certain sum of money against Nasib Ullah in the year 1951 and on an application made got the half share of Nasib Ullah in the house attached before judgment on 11th November, 1951. The suit was thereafter dismissed for

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default but was subsequently restored and ultimately decreed. In execution of the decree the half share of Nasib Ullah was sold and purchased by the plaintiff-appellant. The sale was confirmed on 28th October, 1959. The appellant claimed to have taken possession on 6th May, 1960.

The contesting defendant-respondent Karim Bux claimed to have acquired Nasib Ullah's share in the house under a sale-deed dated 4th August, 1953. This sale-deed was executed after the restoration of the suit. The defendant Karim Bux's contention was that on the dismissal of the suit in default the attachment before judgment lapsed and since no fresh attachment was made the sale affected by Nasib Ullah on 4th August, 1953 remained unaffected and Nasib Ullah thereafter was not left with any subsisting title to or interest in the house which could have been sold in execution of the decree passed in appellant's favour. The contention of the respondent was repelled by the trial court but upheld by the lower appellate Court, hence this Second Civil Appeal.

O. 38, r. 6 of the Civil Procedure Code authorises a Court to attach before judgment the property of the defendant in case the Court is satisfied that the defendant in order to delay or defeat the execution of a decree that may be passed against him is about to remove or dispose of his property and has failed to furnish the required security. O. 38, r. 9 is the subject-matter of interpretation which is in these words:

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."

The contention of the plaintiff-appellant is that O. 38, r. 9 contemplates a specific order of withdrawal of attachment and so long that specific order of withdrawal of attachment is not passed the attachment continued and the transfer in favour of defendant-respondent no. 1 was of no effect. It is admitted that in the instant case there was no specific order of removal of attachment. Reliance has been placed by the learned counsel for the appellant on *Thampi Muhammad Abdulkhadir v. Padmanabha Pillai Parameshwaran Pillai* (1) wherein it has been laid down that:

“An attachment before judgment which ceased to be in force with the dismissal of the suit will revive when the decree dismissing the suit is subsequently reversed and a decree in the plaintiff's favour is passed, even by the same Court or by a superior Court and this revival will be in force from the date on which the attachment before judgment is effected as provided for in the Civil Procedure Code.”

Reliance has also been placed by him on *Namagiri Ammal v. Muthu Velappa Goundan* (2), but that case has been overruled in *Balaraju Chettiar v. Masilamani Pillai* (3) and it was held that on a dismissal of a suit an attachment before judgment necessarily ceases under O. 38, r. 9 even though the Court does not pass an order withdrawing it. The observations of their Lordship of the Travancore-Cochin go to show that an order of attachment ceases with the dismissal of the suit in spite of any express order. The doctrine of revival of the order is invoked for the continuance of the order after the decree is subsequently reversed. An attachment before judgment is in the nature of an interlocutory order and an extraordinary relief available to the plaintiff even before his claim is adjudicated upon

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(1) A I R 1953 Tra Co 414 (F B) (2) A I R. 1928, Mad 940.

(3) A I R 1980 Mad 514.

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normally cannot be allowed to subsist after the dismissal of the suit. *Gopal Prasad v. Kashi* (1) has also been relied upon by the learned counsel for the appellant in support of his submission wherein it was laid down that:

“An order of the High Court restoring an attachment which has been raised by an order of an inferior court relates back to the date when the attachment was first made, and its effect will be to invalidate a sale made when on the face of the record there was no subsisting attachment of the property sold”

That was a case where their Lordships were considering the effect of a High Court's order under which the attachment was restored with effect from a particular date. The facts of that case are quite distinguishable. A distinction has also to be drawn in cases where the attachment is itself in dispute in execution of a decree and where by an appellate order the order of the inferior court is set aside..

Examining the cases propounding the different views it appears that most of the High Courts are of the opinion that an attachment before judgment ceases after the dismissal of the suit even though no express order is passed. According to the majority view an attachment would terminate no sooner the suit is dismissed by the trial Court. The view of this Court throughout has been that an attachment before judgment ceases on the dismissal of the suit.

In *Ram Chand v. Pitam Mal* (2) it was laid down that an attachment before judgment like a temporary injunction becomes *functus officio* as soon as the suit terminates. The observations of Hon'ble MAHMOOD, J. were based on an earlier Division Bench case of this

(1) I.L.R. 1942 All 39.

(2) I.L.R. 10 All. 506.

Court in *Chunni Kuar v. Dwarka Prasad* (1). The Madras High Court in *Balaraju Chettiar's* case (2) followed the Allahabad view.

The law laid down in *Ram Chand's* case (3) has been followed by this Court in *Dular Singh v. Ram Chander* (4) and in *Ghulam Dastgir v. Mohammad Amin* (5). A Division Bench of the Andhra Pradesh High Court in *Kumaji Sare Mal Firm and Partners v. Kalwa Devadattam* (6) have dissented from the Travancore-Cochin's view and have held that:

"When once attachment is raised as a result of the dismissal of the suit by the trial Court it would not get automatically revived when the suit is decreed in appeal"

From the facts of that case it appears that the attachment was raised.

The Full Bench of Mysore High Court in *Gangappa v. Boregowda* (7) while dissenting from the Travancore-Cochin High Court have laid down that:

"An attachment before judgment is in the nature of an interlocutory order. It is an extraordinary relief granted to a plaintiff even before his claim is adjudicated upon and found to be true and if a suit is dismissed either for default or on its merits by the trial Court and the attachment before judgment has therefore to cease, he can certainly have not as much grievance as a person who has obtained a decree and attached property of the judgment-debtor whose right to attached property has been questioned and decided in summary proceedings and which are made expressly subject to a decision in a regular suit. Moreover, it cannot also be urged that all interlocutory orders like say those passed on applications for

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(1) 1887 Weekly Notes 297.

(2) A.I.R. 1980 Mad 514.

(3) I.L.R. 10 All. 506.

(4) A.I.R. 1934 All 165.

(5) A.I.R. 1937 All 682.

(6) A.I.R. 1958 And. Pra 216.

(7) A.I.R. 1955 Mys 91.

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temporary injunction the operation of which would have to cease on the dismissal of a suit, would automatically be revived or can be deemed to be in force without any further orders by an appellate Court or by the same Court after the suit is dismissed. To hold so would lead to obvious and real difficulties. It is not also as though the plaintiff in such a case has no remedy. He could always apply to the same Court if a suit which has been dismissed for default is restored to file or to an appellate Court which has also ample powers to grant an order of attachment before judgment under the provisions of s. 107(2), C. P. C."

The Bombay, Calcutta, Rangoon and Madhya Pradesh High Courts have followed the interpretation laid down in *Ram Chand's* case (1). In *Chindha Rupla Patil v. Chhaganlal Shrivlal Sheth* (2) a Division Bench of Bombay High Court took the view that under O. 38, r. 9 the attachment before judgment must be considered to have been withdrawn when the suit was dismissed. In *Abdur Rahman v. Amir Sharif* (3) it was laid down by a Division Bench of the Calcutta High Court that:

"An attachment before judgment comes to an end when the suit is dismissed.

In order to avoid all possible doubt and difficulty, the Court should when dismissing a suit make an order under O. 38, r. 9 withdrawing the attachment before judgment. But even if an order directing withdrawal of attachment is not made, on the dismissal of the suit, the attachment before judgment ceased to exist, and it does not revive when an appeal is lodged."

(1) I L R 10 All 506.

(2) A I.R. 1928 Bom, 545.

(3) A I.R. 1918 Cal. 89.

In another Division Bench of the Calcutta High Court *Jyotish Chandra Sen v. Har Chandra Saha* (1) it was laid down that:

"When a suit abates and comes to an end on the death of a party, the attachment before judgment dies with it."

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A Division Bench of Rangoon High Court also in *D. Manackjee v. R. M. N. Chettyar Firm* (2) have gone to the extent of remarking that a surety is discharged upon the dismissal of the suit. In the case of surety the liability of a surety will depend on the terms of the surety bond. But the view of the Rangoon High Court is also in favour of the withdrawal of attachment before judgment on the dismissal of the suit.

The Madhya Pradesh High Court in *Madanlal Chhotelal v. Ramprakash Ghasiram* (3) have dissented from the Travancore-Cochin's view and have preferred the view of this Court and other High Courts. It was laid down by them that:

"The attachment before judgment which terminates on the dismissal of the suit by the trial Court, is not automatically revived by the fact that the appellate Court reversing the dismissal of the suit passes a decree in favour of the attaching plaintiff."

The language of O. 38, r. 9 no doubt is capable of both the interpretations but the well-recognised rule of interpretation is that where the language is capable of two interpretations and where the section or the Act has received a judicial construction and the said construction has long been acted on without any alteration in the statute, the interpretation so recognised and acted on is to be accepted on the principle of *stare decisis* because it is the general maxim that when a

(1) A.I.R. 1928 Cal. 284.

(2) A.I.R. 1927 Ran 810

(3) A.I.R. 1968 M. P. 829.

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point of law has been settled by decision it forms a precedent which is not afterwards to be departed from. The latter part of the rule which requires that the attachment shall be removed when the suit is dismissed is either directory or mandatory. If it is directory the attachment is removed automatically in spite of no order of the Court. If it is mandatory, then the duty of the Court is to pass an order and a party cannot be penalised where the consequences for the dismissal appear to be the withdrawal of the attachment before judgment. The lower appellate Court in these circumstances was right in upholding respondent no. 1's claim based on the transfer in his favour and rejecting the plaintiff-appellant's contentions.

This appeal, therefore, has no force and is accordingly dismissed but in the circumstances of this case costs shall be on parties

R. L. GULATI, J.:—I have read the judgment prepared by brother TRIVEDI, J. but I regret I cannot subscribe to the view taken by him.

The object of attachment before judgment as provided in O. 38, r. 6, C. P. C. is to prevent a defendant from delaying or defeating the execution of a decree that may ultimately be passed against him by removing or disposing of his property. In other words, this provision is meant to afford a protection to the plaintiff until his claim is finally decided. Where a suit is dismissed for default, but is subsequently restored, the protection must ensure to his benefit during the time between the date of dismissal and the application for restoration. If the attachment automatically lapses on the dismissal of the suit, he would lose such a protection and the defendant would be free to carry out his design of defeating or delaying the decree which may

ultimately be passed against him by putting the property out of the reach of the plaintiff by transfer, etc. In such a case even if the plaintiff files an application for restoration and simultaneously makes an application for attachment before judgment, the Court will not be able to pass an order of attachment with retrospective effect so as to cover the gap between the date of dismissal and the date of filing the application. The same would be the position if the suit is dismissed on merits. If the attachment lapses immediately on the dismissal of the suit, the plaintiff would be exposed to the risk between the period of dismissal of the suit and the filing of the appeal. The appellate Court may grant to the plaintiff interim relief by way of attachment before judgment from the date of the filing of the appeal. But the appellate Court would also not be able to undo the mischief that might have been done by the defendant during the interval. It is to guard against such an eventuality that O. 38, r. 9 provides that an order of attachment shall remain in force even if the suit has been dismissed, unless that order has been specifically withdrawn which normally would be done after notice to the plaintiff. If the order of attachment lapses without notice to him, the plaintiff would be helpless even if the suit is restored by the trial Court or is decreed on appeal. O. 38, r. 9 has been couched in peremptory language and there appears to be good reason for its being so couched. The idea appears to be that when a suit is dismissed, the defendant should make an application to the Court for the withdrawal of the attachment and it would be in the discretion of the Court not to grant such an application until the period for filing an application for setting aside the *ex parte* order expires, or when the suit has been dismissed on merits, until the time for filing an appeal expires. Such a course would obviate the difficulty I

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have pointed out above. It is true that some little inconvenience would be caused to the defendant in applying for obtaining an express order of withdrawal of attachment when the plaintiff's suit has been dismissed. But as against that, the loss caused to the plaintiff would be irreparable if the attachment lapses without specific order of the Court. Moreover, even if the order of attachment remains in force after the suit has been dismissed for want of specific order of withdrawal by the Court, it would not cause much injury to the defendant, because there would be no decree against him in satisfaction of which the property attached can be sold. Of course he might find some difficulty when he wants to dispose of the property. But that difficulty can be overcome by seeking an express order of withdrawal from the court. If this procedure is not followed, the plaintiff might suffer an injury for which there would be no redress. I do not think the Legislature contemplated such a result.

In the circumstances I see no reason why the mandatory language of r. 9, O 38 should be interpreted in a permissive or directory manner. For this reason I would prefer to follow the Full Bench decision of *Thampi Muhammad Abdulkhadir v. Padmanabha Pillai Parameswaran Pillai* (1).

In the instant case the defendant had disposed of the house in question after the suit had been restored. Since no order had been passed withdrawing the attachment, the same, in my opinion, continued and the transfer of the house during the pendency of the suit was unauthorised.

I would accordingly allow the appeal with costs.

BY THE COURT:—In view of the majority opinion the appeal is dismissed. Costs on parties.

Appeal dismissed

(1) A I.R. 1952 Tra Co 414.

APPELLATE CRIMINAL

Before Mr. Justice J. M. L. Sinha

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Factories Act, 1948, s. 106—Requirements of—Complaint to be made within three months—Cognizance can be taken any time thereafter.

What s. 106 requires is that the complaint should be made within three months. Once the complaint is made within that period cognizance thereof can be taken any time thereafter.

Gopal Das Sondhu v. State of Assam (1) relied.

—, s. 8(2) and (4)—District Magistrate has dual character.

Even though the District Magistrate is a factory Inspector, he is also a Magistrate exercising jurisdiction throughout the district and in that capacity he constitutes a Court. Under the circumstances the fact whether the complaint was sent by the factory Inspector to the District Magistrate treating him to be a superior officer in the hierarchy of his department, or it was sent to him as a Court, should rest on the language of the complaint and the letter accompanying it.

Criminal Procedure Code 1898, s. 190(1)(a)—Presentation of Complaint by post—Effect.

It may be noticed that the words used in sub-cl. (a) of s. 190 are "upon receiving complaint". The word "receiving" should include receiving by post. It will thus appear that there is nothing even in s. 190 which may lead to the conclusion that a complaint must necessarily be presented to the Magistrate by the complainant himself or through his counsel.

Government Appeal no. 831 of 1969 from the order of acquittal dated 16th January, 1969, passed by V. P. Singh, Magistrate 1st Class, Saharanpur.

Government Advocate, for the Appellant.

J. M. L. SINHA, J.:—This appeal has arisen out of the order, dated January 16, 1969 passed by a Magistrate

(1) A.I.R. 1961 S.C. 986

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1st Class, Saharanpur, dismissing the complaint filed against the respondent for his prosecution under s. 92 of the Factories Act.

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The prosecution case, very briefly stated, was as follows:

Sri M. C. Mathur Inspector of Factories, Meerut Region, Meerut, inspected M/s. New International Industries, Pacca Bazar, Saharanpur on May 10, 1967 and found that the factory was committing a breach of r. 3 of the rules framed under the Factories Act punishable under s. 92 thereof. A complaint was, therefore, submitted by Mr. M. C. Mathur to the District Magistrate, Saharanpur, praying that cognizance of the offence may be taken by him. The complaint bears no date but it was sent to the District Magistrate through a letter, dated August 2, 1967. It can, therefore, be presumed that the complaint had been prepared on or before August 2, 1967. The complaint was transferred to the City Magistrate for disposal under orders, dated August 4, 1967 passed by the Additional District Magistrate. The first order on the order-sheet of the court of City Magistrate, Saharanpur is, dated August 26, 1967. By this order the learned Magistrate directed that the case be registered and the respondent be summoned for September 16, 1967. It appears that after appearance before the City Magistrate, the respondent raised an objection that his prosecution was barred by time as it was on August 26, 1967, i.e. subsequent to the statutory period of three months, that the cognizance was taken by the Court. This objection found favour with the learned City Magistrate with the result he dismissed the complaint as barred by time. Feeling aggrieved

against it the State of U. P. has come up in appeal before this Court.

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I have heard learned counsel on either side and have also perused the record of the case. The relevant part of s. 106 of the Factories Act, on which reliance has been placed by the court below for dismissing the complaint as barred by time, reads as follows:

‘No court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector.’

A perusal of the above would clearly reveal that what the section requires is that the complaint should be made within three months. Once the complaint is made within that period cognizance thereof can be taken any time thereafter. This was the view expressed by this court in case of *Gopal Das Saxeria v State* (1)

A perusal of the judgment of the trial court indicates that it was confused on the point whether the section required the cognizance of the case being taken within three months or it required only the complaint being made within that period. In any case if on an examination of the relevant material on record it is found that the complaint was made within statutory period of three months, the order passed by the learned Magistrate must be held to be erroneous.

According to the allegations made in the complaint, it was on May 10, 1967 that the Inspector came to know about the commission of the offence by the respondent. It would, therefore, follow that the complaint could

(1) A.I.R. 1955 All. 511

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be made till August 9, 1967. A perusal of the record reveals that the complaint duly drafted and signed was forwarded by the Factory Inspector to the District Magistrate through his letter, dated August 2, 1967, and, on 4th August, the Additional District Magistrate endorsed an order thereon transferring the complaint to the court of City Magistrate for disposal. In view of the order passed by the Additional District Magistrate there can be not an iota of doubt that the complaint had reached the Additional District Magistrate on or before August 4, 1967. Since the limitation for filing the complaint extended up to August 9, 1967 it must be held that the complaint had been made within the period of limitation.

Learned counsel for the respondent contended that the complaint was sent by the Factory Inspector to the District Magistrate as Administrative Officer and not as a court. It was also urged that the order passed by the Additional District Magistrate on August 4, 1967 transferring it to the City Magistrate was also an administrative order. On these premises learned counsel contended that the complaint should be deemed to have been made for the first time only when it reached the court of the City Magistrate and not any time before it. I have given my careful thought to this argument but I am unable to accept it. It is worthy of notice that the complaint is addressed to the court of District Magistrate, Saharanpur, as is apparent from the language on the top of it. The complaint was not addressed to any Officer. Further, it was requested in the complaint that cognizance of the case may be taken. The complaint being addressed to the court of District Magistrate this request should also be deemed to be addressed to him. The letter through which the complaint

was forwarded to the Court of District Magistrate also contains a request addressed to the District Magistrate for taking cognizance of the complaint. Since the complaint was addressed to the court of the District Magistrate and contained a request addressed to him for taking cognizance of the complaint it could by no stretch of imagination be accepted that the complaint was sent to him in his administrative capacity. In fact interpreting the complaint in that manner in the instant case would amount to misreading it.

As for the latter part of the argument, i.e. that the order passed by the Additional District Magistrate on the complaint transferring it for disposal to the City Magistrate should be held to be an administrative order, as it was passed before cognizance was taken, nothing will turn on it. If the complaint is made to a court and the court transfers it to another court for disposal before taking cognizance of it the order of transfer can be treated to be an administrative order as held in the case *Gopal Das Sindhi v. State of Assam* (1). That cannot, however, have any bearing on the fact that the complaint had been made in court. As already stated earlier the requirement of s. 106 of the Factories Act is that the complaint should be made within a period of three months. If the complaint is made within that period the mere fact that the court in which the complaint was filed dealt it administratively to transfer it to another court for disposal cannot undo the making of it.

Learned counsel for the respondent then contended that under s. 8(4) of the Factories Act the District Magistrate is a Factory Inspector for his district. Learned counsel contended that it should, therefore, be presumed that the complaint was forwarded by the Factory Inspector to the District Magistrate as a superior

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officer in the heirarchy of his department and, consequently, the complaint cannot be deemed to have been made to a court during the period it was dealt with by the District Magistrate or the Additional District Magistrate.

It is true that under s. 8(2) the District Magistrate is a Factory Inspector for his district. An officer can always have a dual character. Even though the District Magistrate is a Factory Inspector he is also a Magistrate exercising jurisdiction throughout the district and in that capacity he constitutes a court. Under the circumstances the fact whether the complaint was sent by the Factory Inspector to the District Magistrate treating him to be a superior officer in the heirarchy of his department or it was sent to him a court should rest on the language of the complaint and the letter accompanying it. Indeed it should not rest on imagination or presumption which have no basis. I have already stated earlier that the complaint in the instant case was addressed to the court of the District Magistrate and the complaint contained a request asking the District Magistrate to take cognizance thereof. In the letter accompanying the complaint also the District Magistrate was requested to take cognizance of the complaint before a particular date. Neither the letter nor the complaint even impliedly state that the complaint may be forwarded to the competent court for disposal. The language used in the complaint and the letter accompanying it leave absolutely no room for doubt that the complaint was sent to the District Magistrate as a court and not as a Factory Inspector.

It was also urged that the cases under the Factories Act were formally heard by the City Magistrate and not by District Magistrate and it should, therefore, be presumed that the complaint was sent to the District Magistrate only for administrative action and not for

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any judicial action. I am once again unable to agree. A District Magistrate exercises the powers of a Magistrate, 1st Class throughout the district and in that capacity he is competent to take cognizance of the offences under the Factories Act as well. It was, therefore, open to the Factory Inspector to make the complaint to the District Magistrate. It was thereafter the choice of the District Magistrate either to proceed with the case himself or send it to any other court for disposal. I fail to find any basis for the contention that the complaint was sent to the court of the District Magistrate for administrative action and not for judicial action.

Learned counsel for the respondent contended that a complaint must be presented before the court personally or through a counsel. It was urged that since the complaint in this case was sent by registered post it cannot be deemed to be validly presented and the order of the court below should be maintained on that ground. There is more than one reason for which this contention cannot be accepted.

A perusal of the order passed by the court below discloses that it did not dismiss the complaint on the ground that it was not validly presented. Further, the contention is also not supported by any provision contained in the Cr. P. C. The expression 'complaint' is defined in s. 4(1)(h) thus—

“Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action, under this Code, that some person known or unknown has committed an offence but it does not include the report of a police officer.”

Now, a complaint in writing sent to a Magistrate with a view to his taking action is very much a complaint within the meaning of s. 4(1)(h) reproduced above

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There is nothing in s. 4(1)(h) which may even impliedly mean that the complaint must be made to the Magistrate personally.

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The next relevant section in the Code of Criminal Procedure is s. 190(1)(a) which reads as follows:

“Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence:

(b)

(c)

It may be noticed that the words used in sub-cl. (a) are “upon receiving a complaint”. The word “receiving” should include receiving by post. It will thus appear that there is nothing even in s. 190 which may lead to the conclusion that a complaint must necessarily be presented to the Magistrate by the complainant himself or through his counsel.

Learned counsel for the respondent referred me to the second part of s. 200, Cr. P. C. which reads as follows:

“A Magistrate taking cognizance of an offence on complaint shall at once examine the complaint and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.”

The learned counsel contended that the above provision of law requires that a complainant must be examined immediately after he presents the complaint and unless the complaint is presented personally the com-

pliance of this provision of law will not be possible. Learned counsel urged that s. 200 thus impliedly lays down that the complainant must present his complaint personally to the Magistrate.

I have given my careful thought to the contention raised but I am unable to accept it. A careful reading of s. 200, Cr. P. C. would show that it is only when a Magistrate takes cognizance that he has to examine the complainant. So long he does not choose to take the cognizance, he need not examine the complainant. This view finds full support from the case *Gopal Das and others v. State of Assam* (1). As observed in this case a court may, after receiving the complaint and before taking cognizance thereof, choose to order investigation by the police under s. 156, Cr. P. C. or may transfer it to another Magistrate, which will be an administrative act. It is not necessary to examine the complainant under s. 200, Cr. P. C. in either of these two situations. Since the examination of the complainant immediately on presentation of the complaint is not mandatory, it cannot be accepted that s. 200 impliedly enjoins that the complaint should be presented to the court by the complainant in person.

It may also not be out of place to mention that wherever the Legislature intended presentation of an application personally to a court it expressly said so. A reference in this connection can be made to a couple of provisions contained in the Code of Civil Procedure. R. 1 of O. III thereof states—

"Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the

(1) A.I.R. 1961 S.C. 987,

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time being in force, be made or done by the party *in person*, or by his recognised agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf."

By the above provision the Legislature made it clear that every suit, plaint or application to be filed in court shall be presented either by the party himself or through his counsel or recognised agent. O. XXXIII, r. 3 which relates to application for permission to use in *forma pauperis* reads thus—

"Notwithstanding anything contained in these rules, the application shall be presented to the court by the *applicant in person*, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person "

It will thus appear that in the above provision of law also, since the Legislature intended that the application should be made personally by the party concerned or his agent, it said so in clear words.

Since there is no provision in the Cr. P. C. stating either expressly or impliedly that the complaint must be presented to the Magistrate by the complainant personally it cannot be held that a complaint sent by post is not valid and cannot be taken cognizance of.

Learned counsel for the respondent referred me to the case *Baldeo Das v. The State* (1) in which BRIJ-MOHAN LAL, J. made the following observation—

"Sending by post is not the proper method of presenting the complaint; the complainant should

(1) A.I.R. 1952 All. 987.

have either personally presented the complaint before the City Magistrate or should have engaged a lawyer to perform the duty of presenting the complaint in person. A complaint sent by post is not a validly presented complaint unless the rule permit it in any locality. . . ."

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On a perusal of the entire report, however, I find that the above observations are, if I can say so with respect, in the nature of *obiter dicta*. A complaint relating to an offence under s. 92 of the Factories Act was addressed to the City Magistrate. The commission of the offence had come to light on August 13, 1949 and the period of filing the complaint, therefore, expired on November 12, 1949. Though the complaint was addressed to the City Magistrate it was received in the office of the District Magistrate, and, the Office Superintendent, through an order dated November 12, 1949, sent it to the court concerned for disposal. The complaint reached the court of City Magistrate on December 5, i.e., after the expiry of the period of limitation. Since the complaint was not addressed to the District Magistrate nor the order on the complaint transferring it carried the signature of the District Magistrate, BRIJ MOHAN LAI., J. held that the complaint should be deemed to have been made only on the date on which it reached the court of the City Magistrate and therefore was barred by time. The complaint was not sent by post to the court of City Magistrate. The observation reproduced earlier, therefore, was not necessary for the disposal of the case and appears to have been made only in reply to an argument that the fault lay with the District Magistrate in not transmitting the complaint to the court without delay. I am of the opinion that the observation is of no help to the respondents.

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In *Hidayatullah v. Emperor* (1) (which is a Division Bench Decision) telegrams were sent by one Hidayatullah to the Deputy High Commissioner, Peshawar and Assistant Commissioner alleging that the Sub-Inspector had committed certain offences against him. A question arose in that case whether the telegram sent could constitute complaint or not.

It was observed—

“Learned counsel for the petitioner has urged that in no circumstances can a telegram amount to a complaint as defined in s. 4(h), Cr. P. C. and bases its contention on s. 200, Cr. P. C. which directs that a Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant pointing out that a person who sends a telegram cannot be at once examined. In view of the fact that the definition of a complaint includes an allegation made in writing and does not in itself necessitate the presence of the complainant, we are unable to accept this contention and we do not consider that it is supported by *In Re Hari Lal Buch* (2) and which were cited by counsel in support thereof.”

Yet another case relevant on the point is *State v. Satya Narain* (3). This case related to an offence under s. 92 of the Factories Act. The complaint in this case was sent to the District Magistrate by registered post. A question arose for consideration whether the complaint was validly presented. The Court observed—

“There is no provision either in the Factories Act which make it necessary for the Inspector of Factories to make his complaint before a competent court to be present personally or through a

(1) A.I.R. 1986 Pesh. 66.

(2) I.L.R. 22 Bom. 949.

(3) A.I.R. 1960 Pat. 514.

lawyer. He is a public servant and, as laid down in proviso (aa) to s 200 of Cr. P. C. the examination of a complainant on solemn affirmation is not required if the complaint is made by him as a public servant in the discharge of his official duty. This obviates the necessity of the public servant at the time of filing a complaint for the purposes of being examined under s. 200 "

For all the reasons stated above the contention raised on behalf of the respondent that the complaint having been sent by post in the instant case was not validly presented cannot be accepted.

Learned counsel for the respondent lastly contended that the order-sheet does not show that Sri M. C. Mathur, Factory Inspector, who had filed the complaint was present before the court below on the last date when the case came up for hearing and consequently the normal course to be adopted by the Magistrate was to dismiss the complaint for default of the complainant. Learned counsel urged that the order of the dismissal of the complaint recorded by the learned Magistrate may be maintained on that ground.

There is more than one reason for which the argument cannot be accepted. A perusal of the order passed by the learned Magistrate clearly indicates that he did not dismiss the complaint for the default of the Factory Inspector. That is also apparent on a perusal of the order-sheet. The case was fixed for arguments since some time prior to October 7, 1968. On that date, viz. October 7, the Inspector of Factories informed the court that he would not submit any arguments. On the subsequent dates the case was listed for arguments, obviously of the other party. There was nothing to be done by the Factory Inspector. Consequently, his presence was not at all necessary. Under s. 247 of Cr. P. C. if the complainant is absent on any date fixed for

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hearing, the Magistrate has two courses open to him. He may either dismiss the complaint and acquit the accused or adjourn the hearing of the case to some other date. Since the Factory Inspector had already made a statement on an earlier date that he would not submit any argument and since his presence was obviously not necessary on the subsequent dates, the presumption is that the Magistrate would not have dismissed the complaint on that ground. In case, he had negatived the contention raised on behalf of the respondent regarding limitation, he would have in all probability listed the case on some other date for recording the prosecution evidence.

None of the contention raised on behalf of the respondent therefore carry any substance.

In the result disagreeing with the court below I find that the complaint in the instant case had been made within the prescribed period of three months and that the finding of the court below to the contrary is erroneous.

This appeal is accordingly allowed. The judgment and order, dated January 10, 1969 passed by the court below are set aside and the case is remanded for fresh trial according to law.

Appeal allowed.

CRIMINAL REVISION

*Before Mr. Justice D. S. Mathur, A. C. J.**

RAM SUKH KUMHAR AND OTHERS

APPLICANTS,

1972
 August, 14,

v.

STATE

... OPPOSITE-PARTY.

Code of Criminal Procedure, 1898, s 526(1)(i) and (ii)—Transfer of case, inquiry or trial—Jurisdiction of transferee's court to deal and enquire with cases which may later on be

* While sitting at Lucknow.

instituted against persons not covered by the original case.

S. 526(1), Cr. P. C. empowers the High Court to pass any of the four orders detailed therein, or to pass an order under one or more clauses of this section. Consequently, if the High Court had, by an order express or implied, ordered the transfer of an inquiry into or trial of an offence, the transferee court would have had the jurisdiction to take up commitment proceedings in respect of other accused

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In the instant case, however, the two cross-cases had been transferred. None of them was against the present applicants. Consequently, the order of transfer as it at present stands did not empower the Additional District Magistrate (Judicial), Lucknow, to institute proceedings against the present applicants in respect of the offence committed within the district of Bara Banki.

Criminal Revision no. 77 of 1972 against the order of P. C. Jain, Civil and Sessions Judge, Lucknow, in Criminal Revision no 98 of 1971 decided on February 16, 1972.

Saghir Ahmad, for the Applicants.

Asstt Government Advocate, for the State.

D. S. MATHUR, A. C., J.:—This is a criminal revision by Ram Sukh Kumhar and three others to challenge the order of the Additional District Magistrate (J), Lucknow, issuing notice to them to appear in his court for inquiry into offences under ss. 307/149 and 147 or 148, I. P. C.

The material facts of the case are that there was a riot in village Mohsandi, police station Mohammadpur, district Bara Banki in which six persons were killed, five on one side and the sixth on the other. The police submitted charge-sheets against both the parties, but not against the present applicants. The Additional District Magistrate (J), Bara Banki, took cognizance of the two police reports, and commenced proceedings under Chap. XVIII of the Code of Criminal Procedure, i.e., inquiry into cases triable by the Court of Session. At this stage no action was being taken against the applicants and there were only two cases pending before

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the Additional District Magistrate (J), Bara Banki one against Balraj Singh and others, and the other against Jagdamba Singh and others

Thereafter Balraj Singh and others moved applications under s. 526(1), Cr. P. C. before the High Court for transfer for both the cross-cases from district Bara Banki on the ground that on account of Ram Bahadur Singh, accused in the other case, being an Advocate practising at Bara Banki, they were finding it difficult to secure the services of a good advocate at Bara Banki. The applications were allowed under Court's order, dated March 9, 1970 and the two inquiry cases were transferred to the Court of Additional District Magistrate (J), Lucknow. Both the cases have been committed to the Court of Session.

During the pendency of the commitment proceedings Chiraunji Lal, complainant, made an application for making an inquiry into the same incident (offences) in respect of the present applicants also. While committing the accused to the Court of Session the Additional District Magistrate (Judicial), Lucknow, ordered that notices be issued to the present applicants for appearance in the inquiry to be conducted by him in respect of the allegation that they were also responsible for the commission of the offences. This order is dated June 7, 1971. The applicants preferred a revision before the Sessions Judge but it was dismissed under order dated February 16, 1972. The present revision is to challenge the orders of both the subordinate courts.

As shall appear from the Court's order, dated March 9, 1970 what was transferred from the court of Additional District Magistrate (Judicial), Bara Banki, to the court of Additional Magistrate (Judicial), Lucknow, were the two criminal cases, *State v. Balraj Singh and others* and *State v. Jagdamba Singh and others*, then

pending before the Additional District Magistrate (Judicial), Bara Banki. The question that arises for consideration is whether on transfer of a case the transferee Court can take cognizance of the same offence against persons not being tried or proceeded with in such case—at the time of the transfer thereof.

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Transfer application is moved before the High Court under s. 526(1), Cr. P. C. and an order of transfer can be passed on one of the grounds detailed therein. While ordering transfer of the case the High Court can pass one of the four kinds of orders detailed therein. Cl. (i) contemplates an order transferring the inquiry into or trial of an offence to a court not empowered under ss. 177 to 184, Cr. P. C. but in other respects competent to inquire into or try such offence. A second kind of order which the High Court can pass under Cl. (ii) is to transfer any particular case from one criminal court to another. With the other two kinds of orders contemplated by s. 526(1), Cr. P. C. we are at present not concerned.

Where an inquiry into or trial of an offence is transferred, the transferee Court can take action against a person alleged to have committed such offence. There is no transfer of a particular case. The order being general, it shall cover all the cases arising out of that incident. Consequently, the transferee Court has the jurisdiction to try or to inquire into not only the cases sent up by the police but also to take action against other persons on an application being moved during the pendency of the police cases, in fact, even after the conclusion of such inquiry or trial. In other words, if the High Court had passed the order of transfer under Cl. (i), the Additional District Magistrate (Judicial), Lucknow, could issue notice to the applicants and hold an inquiry against them.

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However under Cl. (ii) of s. 526(1) what is transferred from one criminal court to another is a particular case. Enquiry proceeding is also a case. Consequently, by transfer of one case against some of the persons alleged to have committed the offence there is no implied transfer of proceedings or case which may later be instituted against persons not covered by the original case. Therefore, an order under Cl. (ii) does not contemplate the transfer of other connected cases, nor does it authorise the transferee court to exercise jurisdiction in other cases arising out of the same offence.

S 526(1), Cr P. C. empowers the High Court to pass any one of the four orders detailed therein, or to pass an order under one or more clauses of this section. Consequently, if the High Court had, by an order express or implied, ordered the transfer of an inquiry into or trial of an offence the transferee court would have had the jurisdiction to take up commitment proceedings in respect of other accused.

In the instant case, however, the two cross-cases had been transferred. None of them was against the present applicants. Consequently, the order of transfer as is at present stands did not empower the Additional District Magistrate (Judicial), Lucknow, to initiate proceedings against the present applicants in respect of the offence committed within the district of Bara Banki.

The inquiry or trial against the present applicants can be started at Bara Banki unless transferred to another district under orders of the High Court. Realising this, the learned advocate for the applicants mentioned before me that if the inquiry or trial is to take place, it should be conducted by the courts at Lucknow and not at Bara Banki. In these circumstances the High Court can *suo motu* transfer the inquiry, and also the trial, to be held by the courts at Lucknow.

The Criminal Revision is hereby allowed and the impugned order of the Additional District Magistrate (Judicial), Lucknow, directing the issue of notice is quashed. However, in the interest of the applicants, it is further ordered that the inquiry into the offences in question shall stand transferred to the court of the Additional District Magistrate (Judicial), Lucknow, who shall now have the power to entertain the application already made for taking action against the applicants and thereafter, if considered necessary, to commit the case to the Court of Session, Lucknow, to be tried at Lucknow.

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Revision allowed.

APPELLATE CRIMINAL

Before Mr. Justice P. N. Bakshi

NAGAR. MAHAPALIKA, VARANASI ... APPELLANT,

v.

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August, 25.

Prevention of Food Adulteration Act, 1954, s. 2(1)(a).—*Accused informing Food Inspector that oil in his possession is non-edible oil—Sample taken by Inspector can not be said to be adulterated within the meaning of s. 2(1)(a) of the Act—Accused absolved of liability under ss. 7 and 17 of the Act.*

When it is established that the accused informed the Food Inspector who had gone in the shop to take sample of the mustard oil that he was selling non-edible oil, it could not be said that the sample taken from the accused is not of the nature, substance or quality, which it purports or is represented to be. When the accused never claimed to have sold pure mustard oil to the Food Inspector, the sample taken possession of by the Food Inspector can not be said to be adulterated within the meaning of s. 2(1)(a) of the Act and the accused did not commit the offence under s. 7 read with s. 16 of the Act.

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Criminal Appeal no. 116 of 1970 from the order of S. N. Gupta, Addl. City Magistrate, Varanasi, dated October 3, 1969 in Case no. 678 of 1969.

A. P. Misra, for the Appellant.

N. K. Roy, for the Respondent.

P. N. BAKSHI, J.:—Parmesar, son of Chunni Sao has been acquitted by the Additional City Magistrate, Varanasi on October 3, 1969 of an offence under s. 16(1)(a) of the Prevention of Food Adulteration Act, 1954 for selling adulterated mustard oil at his shop C. K. 68/23 Kachchi Sarai, Police Station Chauk on September 27, 1968 at about 12 noon.

The case for the prosecution is that Kesho Prasad Singh Food Inspector, Nagar Mahapalika, Varanasi went to the shop of the accused situate in Mohalla Kachchi Sarai at about 12 noon on September 27, 1968. The accused who was running a grocer's shop (Perchoon-ki-dookan) was present at that time. The Food Inspector informed him by tendering Form no. 6 that he wanted a sample of the mustard oil which was being purchased by him for chemical examination. He purchased 375 grams of mustard oil from the accused on payment of Rs.1.50 at the rate of Rs.4 per kg. The said oil was divided in three parts and put in three separate phials which were sealed and labelled in the presence of the accused. The accused signed these labels. The Food Inspector obtained receipt for the sale which was also signed by the accused and the witnesses. When the accused signed the receipt he described the mustard oil as 'Akhadya tail'. The Food Inspector gave one phial to the accused and retained the other two with himself. Out of these two phials retained by him, one was sent to the Public Analyst, Lucknow for examination and report. On receipt of the report of the Public Analyst it was discovered that the mustard oil was adulterated. He, therefore, sub-

mitted his report to the Nagar Swastha Adhikari and obtained his sanction for prosecuting the accused under s. 7/16 of the Prevention of Food Adulteration Act. He then filed a complaint on March 22, 1969 in the court of the Sub-Divisional Magistrate, Varanasi, which is Ex. Ka-6 on the record. The accused was, thereafter, charged for having committed an offence under s. 16(1)(a) of the said Act.

The accused pleaded not guilty. In his statement recorded under s. 342, Cr. P. C. he took up the plea that he had informed the Inspector at the time of sale that the mustard oil in question was non-edible oil (Akhadya tail). In short, the defence was that at the time when the sample was taken by the Food Inspector the accused informed him that the mustard oil which was being sold by him was non-edible oil and as such he had not committed any offence. The accused examined Sheikh Nazir Ahmad, D. W. 1 in his defence. Nazir Ahmad is the land lord of the shop where the accused carries on his business. The defence case as elaborated by Nazir Ahmad in his statement is that the oil in question is used for colouring purposes and not meant for human consumption.

The prosecution in support of its case examined Kesho Prasad, Food Inspector, P. W. 1 and Phool Chand Hawaldar, P. W. 2. Both these witnesses have deposed to the prosecution story. Notice Ex. Ka-1, receipt Ex. Ka-2, report of the Public Analyst, Ex. Ka-3, report of the Food Inspector, Ex. Ka-4 sanction for prosecution Ex. Ka-5 and the complaint Ex. Ka-6 had been filed in support of the prosecution case.

The Additional City Magistrate has acquitted the accused on the ground that because Parmesar informed the Food Inspector before giving the sample of his

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mustard oil that the said mustard oil was non-edible (Akhadya tail) and because the accused wrote down the words non-edible (Akhadya) on the notice Ex. Ka-1 and the receipt Ex. Ka-2, the Food Inspector should not have taken the sample of oil from the accused. He was of the view that it is not proved beyond reasonable doubt that the sample of the oil which was purchased by the Food Inspector for analysis was edible oil and as such the benefit of doubt must go to the accused. On this finding he has acquitted the accused. Aggrieved by the aforesaid order the Nagar Mahapalika, Varanasi has now filed an appeal under s. 417, Cr. P. C. before this Court.

I have heard counsel for the parties and have also gone through the entire evidence on the record. Counsel appearing on behalf of Nagar Mahapalika, Varanasi has very strenuously urged that the view of the court below is perverse and illegal. He has submitted that the offence u/s. 7/16 of the Prevention of Food Adulteration Act had been fully established from the evidence on the record. He has referred to certain relevant sections of the Prevention of Food Adulteration Act and has also cited some case law in support of his arguments to which reference shall be made hereafter. Counsel for the accused, on the other hand, contends that in an appeal against acquittal the findings of the court below should not be set aside and the accused is entitled to the benefit of doubt. He has further submitted that no offence has been committed by the accused. I shall now examine the force of these arguments.

It is proved from the statement of Kesho Prasad, Food Inspector, P. W. 1, as well as of Phool Chand, P. W. 2, that the sample of mustard oil in question was purchased from the shop of the accused. It is also

proved from their evidence that before purchasing the sample the Food Inspector informed the accused that it was being taken for the purpose of analysis. It is further proved from the statement of the afore-said witnesses that the accused had informed the Food Inspector at the time of the sale that the mustard oil of which sample was being purchased was non-edible oil and that the accused made an endorsement to that effect in the notice Ex. Ka-1, as well as in the receipt for payment of the price Ex. Ka-2. In both these documents the accused has endorsed the words "Akhadya tail". It is also proved from the report of the Public Analyst that a sample of the mustard oil taken from the shop of the accused contained a large proportion of linseed oil. The Public Analyst has given the proportion as 35 1 per cent. These are facts which can admit of no doubt, having been established from the evidence on record.

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The question, however, which remains for consideration is whether on these facts the accused can be held guilty of an offence under s 16(1)(a) of the Prevention of Food Adulteration Act S 7(i) of the Act prohibits the sale of any adulterated food S. 16(1) imposes a penalty for such prohibited sale. S. 16(1)(a) of the said Act runs as follows:

"(1) If any person—

(a) whether by himself or by any other person on his behalf imports into India or manufactures for sale, or stores or distributes any article of food:

(i) which is adulterated or misbranded or the sale of which is prohibited by the Food (Health) Authority in the interest of public health

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he shall. . . . be punished with imprisonment for a term which shall not be less than six months but which may extend to six years, and with fine which shall not be less than one thousand rupees."

The question, therefore, for consideration is as to what is adulterated food within the meaning of the Prevention of Food Adulteration Act. Reference may be made to the definition of the word 'Food' as laid down in s 2(v) of the Act. It runs as follows:

" 'Food', means any article used as food or drink for human consumption other than drugs, and water and includes—

(a) any article which ordinarily enters into or is used in the composition or preparation of human food."

The word 'ordinarily' as used in this section has been interpreted by a Full Bench of this Court in *Municipal Board, Kanpur v. Janki Prasad* (1). In that case the question for consideration was: Whether linseed oil can be treated as an item of food. Their Lordships were of the view that linseed oil was food within the meaning of s 2(v)(a) of the Prevention of Food Adulteration Act. In the present case before us the sample which was taken from the shop of the accused was that of mustard oil. It contained a mixture of linseed oil in the proportion of 35 1 per cent. It is argued by the counsel appearing on behalf of the Nagar Mahapalika, Varanasi that this mixture of the two oils amounted to adulteration within the meaning of this Act. It is contended that the prohibition contained in s. 7(1) of the Act is absolute and admits of no exception. It is urged that the accused cannot be absolved of the liability under the Act merely because he

(1) A.I.R. 1968 All. 438.

informed the Food Inspector and made an endorsement of that effect in Ex. Ka-1 and Ka-2 that the oil in question was non edible oil (Akhadya tail). Reliance for this submission is placed on a single Judge decision of this Court in *Nagar Mahapalika, Varanasi v. Srimati Sudheshwari Devi* (1). In that case the accused was selling Ghee by describing it as 'Akhadya'. The learned single Judge was of the view that under R. 44 of the Prevention of Food Adulteration Rules, sale of ghee which contains any added matter not exclusively derived from milk fat is prohibited. As such he found the accused guilty of an offence under s. 7 read with s. 16 of the Prevention of Food Adulteration Act. The definition of the word 'adulterated' was not brought to the notice of the Court in that case. In the present case the position was that the accused had not only informed the Food Inspector that the oil in question was 'Akhadya' but he also made an endorsement to that effect in the notice Ex. Ka-1, as well as the receipt Ex. Ka-2 at the time of sale of his sample. He has also produced a witness Sheikh Nazir Ahmad who has a shop adjacent to the shop of the accused. Sheikh Nazir Ahmad has deposed that there are 8 or 10 factories for the manufacture of boxes and that these factories are purchasing oil in question for colouring these boxes. In my opinion, this defence plea has been fully established from the evidence on the record. Hence it cannot be said in the present case that there was "a mixture of two or more edible oils as an edible oil.". The question is, does it absolve the accused from his liability under s. 7/17 of the Prevention of Food Adulteration Act. S. 2(1) defines the word "adulterated". The definition runs as follows:

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(1) A I.R. 1966 All. 64

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2(i) 'Adulterated'—an article of food shall be deemed to be adulterated—

(a) if the article sold by vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice or is not of the nature, substance or quality which it *purports or represents to be*."

On the facts found by me it is established that the Food Inspector when he went to the shop of the accused informed him that he had come to take a sample of the mustard oil from the accused for analysis. It is also established that the accused informed him that the oil in his possession was non-edible oil. It, therefore, cannot be said that the sample taken from the accused is *not of the nature, substance or quality, which it purports or is represented to be*. The accused never claimed to have sold pure mustard oil to the Food Inspector. He did not say that it was edible oil and could be used for human consumption. He made it very clear that it is non-edible oil. In these circumstances I am of opinion that the sample taken possession of by the Food Inspector cannot be said to be adulterated within the meaning of s. 2(1) (a) of the Act. In this view of the matter I hold that the accused has not committed the offence for which he has been charged.

In the result, therefore, I do not find any force in this appeal, which is hereby dismissed.

Appeal dismissed.

APPELLATE CIVIL

Before Mr Justice Jagmohan Lal.*

JAGAT RANVIR MAHESH

PRASAD SINGH

... APPELLANT.

v.

SMT. BAQRIDAN AND OTHERS ... RESPONDENTS.

Oudh Estates Act, 1869, s. 29-A—Statement in the Will that adoptee has been taken in adoption—Will registered and proved—Substantial compliance with the requirement of the section.

Where the testator had declared in his will which was registered and duly proved that he was taking the plaintiff in adoption held that his will substantially complied with the requirement of s. 29-A of the Act as s. 29-A does not prescribe any set formula in which such a declaration should be made. Under s. 29 of this Act even Mohammedan Taluqdars were permitted to adopt a son and obviously in their case no religious ceremony is required and all that they had to do was to make a declaration in a registered document as required by s. 29-A of the Act.

Transfer of property Act, 1882, s. 10 Proviso—Permanent heritable but non-transferable lease—Condition restraining alienation—Validity of—Right of re-entry in case of breach not reserved—Condition, if, for the benefit of the lessor.

A right of transfer is not a necessary incident of the legal status of a perpetual lessee, and therefore, a condition making the rights of the perpetual lessee of a village non-transferable but heritable is not illegal.

Bhanu Singh v. Ambika Bakash Singh (1) followed.

Where a right of re-entry on breach of condition against alienation is reserved by the lessor, the condition is immediately and demonstrably for the benefit of the lessor. But even in the absence of such condition, facts and circumstances might be brought out to show that the condition was for the benefit of the grantor though that benefit may not be immediate.

Held. on the facts and circumstances of the case and the close relationship existing between the grantor and the grantee, it cannot be said that the restriction against alienation was only a surplusage or redundant condition which in the absence of a right of reentry could not confer any benefit on the lessor in any event.

*While sitting at Lucknow.

(1) A.I.R. 1942 Oudh 274.

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Shi Nath v. Ram Narain (1) *Khetia Pash v. Baharali* (2) *Sachindia v. District Magistrate* (3) *S. S. Roy Choudhury v. A. L. Khan* (4) referred to.

Second Appeal No. 372 of 1963 against the judgment and order dated April, 30, 1963, passed by B. B. Khare, Addl. Civil Judge, Pratapgarh in Civil Appeal No. 242 of 1961.

S. D. Misra for appellant.

H. D. Srivastava and *S. Misra* for respondents

J. M. LAL, J.:—This appeal arises out of a suit filed by the plaintiff appellant in the court of Civil Judge Pratapgarh praying for the cancellation of a sale deed, dated 5th January, 1960 executed by respondents nos. 9 to 11 in favour of one Abdul Rahman who was predecessor of the defendant-respondents nos. 1 to 8, and for possession over the said house after their ejection.

This house admittedly belonged to Raja Jagatpal Bahadur Singh, a Taluqdar of Kaithola Estate. He executed a deed, dated 29th May, 1935 in favour of his wife Rani Dharam Raj Kuer respondent no. 9 in respect of this house and some other property. According to the plaintiff under this deed Rani Dharm Raj Kuer was granted a heritable but non-transferable lease so far as the house in dispute is concerned and as such under the terms of this grant she could only remain in possession of the house but could not make any temporary or permanent transfer thereof. The Raja died on 9th September, 1949. Before that he had adopted the plaintiff-appellant Raja Jagat Ranvir Mahesh Prasad Singh as his son and had also executed a will in his favour. Hence both as an adopted son and as a legatee he was owner of the interest reserved by the Raja in the said house under the deed dated

(1) 1937 Oudh Weekly notes 959
 (3) A.I.R. 1929 Calcutta 228.

(2) 1942 Oudh Weekly notes 504.
 (4) A.I.R. 1956 Tripura 9.

29th May, 1935. Smt. Bimlawati Kumari Devi respondent no. 10 is the daughter of Rani Dharam Raj Kuer and the Raja while respondent no. 11 is their daughter's son. After the death of Rani Dharam Raj Kuer, Smt. Bimlawati Kumari Devi would inherit her property if she survives her. The respondents nos. 10 and 11 had also joined respondent no. 9 in execution of the impugned sale deed. The plaintiff's contention was that by making this unauthorised transfer the lessee lost her lease hold rights and the plaintiff became entitled to get immediate possession over the property which he had sought as an alternative relief in his plaint besides claiming a decree for adjudging the sale deed as void.

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The suit was contested by the defendants. It was denied that the plaintiff was the adopted son of the Raja. It was pleaded that the will executed in his favour by the Raja did not cover the house in suit. It was further pleaded that under the deed, dated 29th May, 1935 Rani Dharam Raj Kuer got the house in suit as an absolute owner and not as a lessee and as such the restriction imposed on her that she could not transfer the property was void under s. 10 of the Transfer of Property Act. Even if the transaction is held to be a perpetual lease this condition was void because the lessor not having reserved any right of re-entry on breach of this condition, it cannot be said that this restriction was for his benefit. Lastly, it was contended that in any case the plaintiff was not entitled to possession over the property without determining the lease by means of a notice under s. 111(g) of the Transfer of Property Act.

The trial court repelled these pleas of the defendants. It found that the plaintiff had been adopted by the Raja and the will executed in his favour by the

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Raja covered this house also. The transaction evidenced by the document, dated 29th May, 1935 was a lease and not an absolute gift and that the condition prohibiting the lessee from transferring this property was a valid condition which was for the benefit of the lessor. As such the sale deed executed by the lessee in favour of Abdul Rahman was void. The trial court therefore granted a decree to the plaintiff for a declaration that the aforesaid sale deed was void against him and also for possession after ejectment of the defendants.

On appeals by the defendants against that decree the lower appellate court affirmed the findings of the trial court. It further held that the adoption was not invalid under s. 29-A of the Oudh Estates Act. But that court was of the opinion that since there was no right of re-entry reserved in the lease and no notice under s. 111 (g) of the Transfer of Property Act had been served on the lessees the plaintiff was not entitled to any relief. On this ground the appeals of the defendants were allowed and the plaintiff's suit was dismissed.

Feeling aggrieved by this decision the plaintiff has filed this second appeal.

On behalf of the appellant it was contended that on the findings recorded by the lower appellate court the plaintiff's suit should not have been dismissed and he should have been granted a decree at least for adjudging the sale deed as void against him though he was also entitled to possession over the property against the transferees who were in unauthorised possession on the basis of the said sale deed. On behalf of the defendants, while supporting the decree of the lower appellate court, the findings recorded on other points against the defendants were traversed. Thus the entire case was

laid open by the parties in this second appeal and it becomes necessary to consider all the points involved in this case except the points which are concluded by the findings of fact.

So far as the question of adoption of the plaintiff is concerned both the courts below have held that the factum of adoption by the Raja has been proved. This is a finding of fact which is not open to challenge in this second appeal. The learned counsel for the defendant-respondents, however, pointed out that in the case of a Taluqdar mere factum of adoption according to the requirements of Hindu Law is not enough but under s. 29-A of Oudh Estates Act, 1869 it is further necessary that the fact of such adoption should be declared by the adoptor in a writing executed and attested in manner required in the case of a will and registered. According to the defendants, this requirement has not been complied with in this case.

The lower appellate court where this plea was raised for the first time, it not having been raised in the trial court, was of the opinion that a statement made by the Raja in his will, dated 27th December, 1945 which is a registered document of which execution has been duly proved, sufficiently complies with the requirement of s. 29-A. This statement as translated in English is as follows:

"Kunwar Jagat Ranvir Mahesh Prasad Singh who is getting education at present and whose age at this time is 14 years and whom I have considered as my family member (Ahal) and so I adopt him (*Main Usko Apni Farzandgi Men Leta Hun.*)"

On behalf of the defendants it was contended that though according to the plaintiff's version his adoption in accordance with the requirements of Hindu Law

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1972 had taken place a few days prior to the execution of this will, there is no mention in this will that the plaintiff had already been adopted by him and as such this declaration does not fulfil the requirements of s. 29-A. I am unable to accept this contention. S. 29-A does not prescribe any set formula in which such a declaration should be made. Under s. 29 of this Act even Mohammedan Taluqdars were permitted to adopt a son and obviously in their case no religious ceremony is required and all that they had to do was to make a declaration in a registered document as required by s. 29-A. This declaration could be in the form that the executant was adopting a certain person as his son. In the present case the words '*Main Usko Apni Farzandi Men Leta Hun*' used by the Raja in his will substantially comply with this requirement. I, therefore, agree with the lower appellate court that the adoption is not invalid.

Besides being an adopted son of the Raja, the plaintiff is also his legatee. From a perusal of this will it is clear that whatever interest had been retained by the Raja under the document, dated 29th May, 1935 in respect of the house in suit was covered by this will and it had not been excluded therefrom. In fact the Raja tried even to whittle down the extent of the grant made under that document which he could not do. That is not an issue before us. The point worth noticing is that whatever interest was retained by the Raja in the house in suit under the document, dated 29th May, 1935 was not excluded from the purview of the will in favour of the plaintiff. So the plaintiff on both these grounds is entitled to step into the shoes of the Raja and safeguard his interest, if any, in the house in suit reserved under the deed, dated 29th May, 1935.

It was next contended by the learned counsel for the defendant-respondents that the Raja made a gift of the house in suit in favour of his wife (respondent no. 9) under the deed, dated 29th May, 1935 and it cannot be construed as a lease. In this connection he laid emphasis on clause 1 of this document which reads as follows:

*"Rani Sahiba mausufa jaydad patta shuda maz-
koor bajmya haqooq malikana misla qurqi wa sar-
sari wa bedakhli waghana wagharia qabiz wa
dakhell rahen."*

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As translated in English it would mean that the said Rani Sahiba shall remain in possession and occupation over the said leased property together with all its proprietary rights such as, attachment, distress and ejectment, etc. Immediately after that cl 2 lays down that the said Rani shall remain in possession and dominion over the leased property generation after generation without any right of transfer. It concludes that besides any right of transfer whether temporary or permanent the Rani will have all sorts of proprietary powers with respect to the property. The nature of the document was described to be a perpetual heritable and non transferable lease (*Patta istemerar qabil wisarat wa na-qabilul-intaqal.*). In my opinion, not only the document has been specifically classified as a permanent heritable and non-transferable lease but the incidents of the transfer as mentioned in the document also make out a clear case of lease and not an absolute gift. The grantor had reserved a right to receive Rs. 5 per year from the grantee as Malikana in respect of the house in suit. This periodical payment described as Malikana is nothing but an amount of money to be paid periodically to the transferor by the transferee within the meaning of s. 105 of the Trans-

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fer of Property Act. The use of the word 'Malikhana' is not conclusive to lead to an inference that it was an absolute transfer of the entire proprietary rights. At one place the grantor had also stated that the object of this grant was to provide maintenance to the grantee who was his own wife. I agree with the courts below that the transaction evidenced by this document, dated 29th May, 1935 so far as the house in suit is concerned is only a perpetual heritable but a non-transferable lease.

The next point that arises for our consideration is whether the condition restraining alienation contained in the above lease is void under s. 10 of the Transfer of Property Act or it is a valid condition under the proviso to that section. This section itself clearly provides that a condition or limitation absolutely restraining the transferee from disposing of his interest in the property shall not be void in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. It was held by a Bench of this Court in *Bhairu Singh v. Ambika Baksh Singh* (1) that a right of transfer is not a necessary incident of the legal status of a perpetual lessee, and therefore a condition making the rights of the perpetual lessee of a village non-transferable but heritable is not illegal. So the only question that arises for our consideration is whether this condition is for the benefit of the lessor or those claiming under him.

On behalf of the respondents it is contended that unless the lessor reserves a right of re-entry on breach of such condition prohibiting alienation of his interest by the lessee, the condition shall not be deemed to be for the benefit of the lessor and it shall be treated as a

(1) A.I.R. 1942 Oudh 374.

surplusage which cannot be defended under s. 10. In support of his contention the learned counsel for the respondents relies on the following decisions:

1. *Kunwar Man Singh v. Bindeshwari Baksh Singh* (1).
2. *Sri Nath v. Ram Narain* (2).
3. *Khetra Nath v. Baharali* (3).
4. *Sachindra v. District Magistrate* (4).
5. *S. K. Roy Choudhury v. A. L. Khan* (5).

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No doubt some observations made in these cases do support the respondents' contention. But those observations have to be read in the context of the facts of those cases.

In *Kunwar Man Singh v. Bindeshwari Baksh Singh* (1) the grant made through a compromise, of zamindari property conferred heritable but non-transferable rights on the transferee. The transferor had also reserved a right to resume the grant and eject the transferee. But on a consideration of all the antecedents of the transaction and the dealing of the parties with respect to the property it was construed to be a grant of under-proprietary rights which by virtue of those rights was held to confer transferable rights. It was therefore held that where a person gets heritable but non-transferable under proprietary rights under a compromise, the deed of compromise or agreement can only be interpreted as conferring upon such person absolute under-proprietary rights and the condition in restraint of alienation, even though contained in a settlement decree, is null and void and in spite of insertion of such condition such a decree conveys an absolute right of transfer. Since the transaction was not

(1) 1937 Oudh Weekly Notes 959. (2) 1942 O.W.N. 504.

(3) A.I.R. 1929 Cal. 228.

(4) A.I.R. 1956 Tripura 9.

(5) 65 C.W.N. 1050.

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construed as a lease there was no occasion to consider if the condition was for the benefit of the lessor and as such valid under s. 10 of the Transfer of Property Act.

In *Sri Nath v. Ram Narain* (1) the question that arose for consideration was whether the transaction relating to the transfer of a zamindari property was a sale so as to be subject to law of pre-emption or it was only a perpetual lease on the basis of which a right of pre-emption cannot be claimed by a co-sharer in the village. It was held that it was only a perpetual lease and not a sale. On this finding the appeal was allowed and the suit for pre-emption was dismissed. After that there was no necessity to consider the terms of the lease and to decide if the restriction against alienation imposed on the lessee under that lease was valid or not. All the same, this matter was also considered and it was observed—

“Where under a deed purporting to be a perpetual lease executed by an under-proprietor the transferee is to enjoy heritable rights and pay fixed malikana and rent, the lessor does not reserve any rights of any kind to himself, and the transferee has the right to eject tenants and manage the property in any way he chooses, and the transferor has no right of enhancement of rent or malikana and has not reserved the right of re-entry to himself under any conditions, but has stated that the transferee has no right of transfer, the deed must be deemed to give full powers to the transferee, and the restraint on alienation is illegal under s. 10, Transfer of Property Act.”

These observations are in the nature of *obiter dicta*.

(1) 1942 O. W. N. 504.

In *Khetra Nath v. Baharali* (1) the original lessee was granted a permanent heritable but non-transferable lease. The lessor had not however reserved a right of re-entry in the case of breach of the condition prohibiting alienation. The heir of the original lessee made a transfer in breach of this condition. The transferee was however recognized by the lessor by accepting rent from him. Thereafter the transferee or his heir made another transfer which was sought to be avoided by the lessor who brought a suit for ejectment. It was held—

“Where a lessor does not reserve to himself the right of re-entry on breach of a covenant against alienation, the lessor cannot sue the holder of the leasehold for recovery of possession on the breach of the condition”

The question whether such restriction is or is not for the benefit of the lessor was not considered in this case. All that was held was that in such a situation the lessor cannot eject the lessee or his transferee under s. 111 (g) of the Transfer of Property Act.

The facts of the case *Sachindra v. District Magistrate* (2) were somewhat complicated. In the original sale-deed creating a *dar-taluq* tenure there was a condition against alienation in favour of an outsider. But no right of re-entry was reserved by the transferor. Subsequently the lessor and the lessee rights came to be owned by the government. Some time after that, another *dar-taluq* lease was granted to the wife of the original owner. In this lease there was no restriction against alienation. The new lessee sold her *dar-taluq* rights to Sachindra petitioner who remained in possession of the property till the District Magistrate passed an order that he had no title in the property and in pursuance of that order the petitioner was dispossessed

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(2) A.I.R. 1956 Tripura 9.

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and certain other action was taken against him when he filed a writ petition under Art. 226 of the Constitution. As the new *dar-taluq* lease granted by the Government to the wife of the original owner contained no restriction against alienation, the transfer made by her to the petitioner Sachindra could not be said to be void. The original lease had obviously come to an end when the lessor and lessee, rights were both owned by the Government. The learned Judicial Commissiner however considered the alternative case also on the assumption that the original sale-deed or the lease-deed creating the first *dar-taluq* tenure which contained the restriction against alienation was still operative and held as follows as is evident from head note (e) of the report—

“Where *dar-taluq patta* executed in Tripura State contained a condition against alienation in favour of an outsider but reserved no right of re-entry to the lessor, and the interest is sold to an outsider, even if the deed be deemed to be operative, the mere fact that in the term it has been laid down that any such action without permission shall be void will not make the sale-deed absolutely void.

Further, as the lessor has not reserved to himself the right of re-entry on breach of the covenant against alienation, the lessor cannot sue the holder of the lease-hold for recovery of possession on breach of the condition.

Where the lessor has not brought forward any suit against alienee on the ground of forfeiture under s. 111 (g), T. P. Act, it cannot be urged with any force that the sale-deed in favour of the alienee which is for valuable consideration is void as this right will be deemed to have been waived under s. 112, T. P. Act.”

So it is evident that it was not a case between the original lessor and the lessee or persons claiming through them.

Lastly the case of *S. K. Roy Choudhury v. A. L. Khan* (1) relates to an ordinary lease from month to month and not to a perpetual lease. There was a restriction imposed on the tenant under the terms of the lease that he will not sub-let the premises. In spite of that he sublet the premises. Normally the tenant and the sub-tenant-both could be ejected after determining the lease by a notice under s. 106 but for the provisions of the West Bengal Premises Tenancy Act, 1956 which was on the same lines as the U. P. (Temporary) Control of Rent and Eviction Act, 1947. Sub-s. (2) of s. 16 of this Act gave protection from ejectment even to those sub-tenants to whom sub-letting had been done with or without the consent of the landlord prior to this Act. In view of this protection the sub-tenant was not liable to ejectment. The landlord, however, wanted to eject the lessee and his sub-tenant on account of the breach of the condition which prohibited sub-letting though there was no right of re-entry reserved by the lessor on breach of this condition. In these circumstances it was held—

“A stipulation in a lease restraining alienation unaccompanied by a proviso for re-entry on its breach is not an effective restraint or bridle on the lessee’s interest in the property and is not really a condition for the benefit of the lessor. Such a stipulation is ineffective as a condition or restraint against alienation. The lease remains operative notwithstanding the breach of the stipulation. Consequently, the sub-lease in the instant case made in breach of the stipulation is valid and operative.”

(1) 65 C W N. 1050.

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Where a right of re-entry on breach of such condition is reserved by the lessor, the condition is immediately and demonstrably for the benefit of the lessor. But even in the absence of such condition, facts and circumstances might be brought out to show that the condition which was for the benefit of the grantor though that benefit may not be immediate. It has been pointed out by the learned counsel for the appellant in this case that the grantor and the grantee were not strangers but they were husband and wife. In the contingency of the grantee dying without leaving any issue the grantor himself would have inherited the grantee's interest. It may be stated that the Raja had previously transferred this very property under a similar document and subject to the same terms to his former wife. She died issueless and her interest in the property was inherited by the Raja himself. Subsequently, he transferred this property to his second wife, respondent no. 9, under the deed dated 29th May, 1935 in which these facts about the previous transfer had also been narrated. The grantee's heirs who could inherit the property in preference to the grantor were the grantor's own issues. So, on the facts and circumstances of this case and the close relationship existing between the grantor and the grantee, it cannot be said that the restriction against alienation was only a surplusage or a redundant condition which in the absence of a right of re-entry could not confer any benefit on the lessor in any event. In my opinion, the benefit of this restriction could under certain circumstances be available to the lessor or his own heirs. As such, this condition will be deemed to be valid under s. 10. That being so, the lessee (respondent no. 9) had no authority to make the transfer in favour of the predecessor of respondents nos. 1 to 8 under the impugned sale-deed dated 5th January, 1960 and this sale-deed shall be

deemed to be void against the appellant who is successor-in-interest of the lessor.

Lastly, we have to see what relief, if any, can be granted to the plaintiff-appellant as a result of the above findings. So long as the lease in favour of respondent no. 9 is not determined by a notice under s. 111(g) of the Transfer of Property Act the plaintiff is not entitled to immediate possession. A lease under this provision can be determined on account of the breach of a condition which provides a right of re-entry for such breach. This condition is not available to the plaintiff-appellant. It also provides that if the lessee renounces his character as lessee and denies the title of the lessor, the lease may be forfeited. Whether or not this condition is available to the plaintiff-appellant, does not arise for our consideration at this stage. All that can be said is that the plaintiff is not in this suit entitled to eject respondent no. 9 so long as her lessee rights are not determined.

It was contended on behalf of the appellant that he is at least entitled to seek possession against respondents nos. 1 to 8 who are in unauthorised possession of the land. These respondents are not in possession of the land as independent trespassers but are claiming through respondent no. 9 and unless the lease in her favour is determined, these transferees also cannot be ejected by the plaintiff-appellant. At the same time, the sale-deed in question executed by the lessee in contravention of the non-alienability clause, is an invasion on the proprietary right of the lessor. He is therefore entitled to get that sale deed adjudged void.

I accordingly allow this appeal to this extent that the plaintiff's suit for adjudging the sale-deed, dated 5th January, 1960 executed by respondents nos. 9 to 11 in favour of Abdul Rahman, predecessor of respondents

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nos. 1 to 8 as void against the plaintiff, is decreed. In the circumstances of the case, the plaintiff shall get half his costs throughout from the respondents who shall bear their own costs

Appeal partly allowed.

APPELLATE CIVIL

Before Mr Justice S. Chandra and Mr. Justice N. D. Ojha

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Forward Contract (Regulation) Act, 1952, s. 14-A—Registered Association—Forward Markets Commission can prevent such Association from carrying on its business—Commission's prior approval necessary

Under s. 14-A of the Forward Contracts (Regulation) Act, 1952 the Forward Markets Commission is empowered to prevent a registered association from carrying on its business in any commodity without its prior approval

Special Appeal No 8 of 1966 from the judgment and order of R. S. PATHAK, J. in Civil Misc. Writ No 1065 of 1965 decided on 11th November, 1965

T. N. Sapru, for the Appellants.

K. C. Agarwal, for the Respondent.

S. CHANDRA, J.:—This appeal raises an important question as to the powers possessed by the Forward Markets Commission, appellant no. 2.

The Bullion and Agricultural Produce Exchange Limited, the respondent, is a public limited company. It carried on the business of regulating and controlling

forward contracts in various goods. The respondent made an application to the Forward Markets Commission for being registered under the Forward Contracts (Regulation) Act, No 72 of 1952, on 15th December, 1962. The Commission issued a registration certificate to the respondent showing that the respondent was entitled to carry on business in Arhar-ki-chooni. One of the conditions mentioned in the certificate was that the respondent shall not conduct forward trading in any commodity other than those specified thereunder except with the previous approval of the Forward Markets Commission. The respondent was, however, content with this condition and it permitted its members to do the business of forward trading in Arhar-ki-chooni only. On June 1, 1964, the Central Government issued a notification under section 17(1) of the Forward Contracts (Regulation) Act the effect of which was that trading in Arhar-ki-chooni was prohibited. The respondent thereupon discontinued trading in this commodity. At that time forward contracts in linseed oil was permissible. The respondent company permitted its members to trade in linseed oil. On December 24, 1964, forward trading in linseed oil was also prohibited. At this time groundnut oil was not a prohibited commodity. So, the respondent commenced business in groundnut oil.

Meanwhile, on June 2, 1964, the Forward Markets Commission had issued a directive to the respondent company not to trade in non-transferable specific delivery contracts in any commodity without the prior approval in writing of the Commission. This apparently was a reminder to the respondent company of the condition contained in the certificate of registration. The respondent, however, ignored this directive and continued its business in groundnut oil. The Commis-

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sion felt that the respondent had violated the conditions of the certificate of registration and was liable to be prosecuted under ss. 20 and 21 of the Forward Contracts Act. Apprehending this, the respondent company instituted a writ petition in this Court. The principal point urged in it was that the Commission had no power to require a registered association to obtain the Commission's prior permission before permitting its members to carry on forward trading in non-transferable specific delivery contracts in a commodity like groundnut oil, the forward trading in which was not prohibited under Chap. IV of the Act, even though such a commodity was not mentioned in the certificate of registration.

A learned single Judge held that s 14-A(1) prohibits an association concerned with regulation and control of business relating to forward contracts in carrying on such business except under and in accordance with the conditions of a certificate of registration. It was observed—

“The conditions must be such as are related to the carrying on of the business. It is under those conditions and in accordance with them that the business must be carried on. It is the conduct of the business, and the manner of its conducting it, to which reference is made here. It is not contemplated that business shall be carried on relating to forward contracts only in respect of certain commodities and no other. That would not relate to the conduct of the business or the manner of its being carried on. That would imply the curtailment of the business, the business being confined in relation to specific commodities only, and no business being permissible in relation to other commodities.”

It was held that s. 14-A(1) does not empower the Commission to prevent a registered association from carrying-on its business in any commodity without its prior approval.

The learned judge held that if the Commission is construed to have such a power it may entail a restriction upon the fundamental rights to carry on forward trading in certain commodities in violation of Art. 19(1) of the Constitution. The Forward Markets Commission was not a body parallel but subordinate to the Central Government. Ample power has been conferred upon the Central Government to control forward trading in respect of commodities. There was no reason why grant of power should be duplicated and conferred also upon the Commission. Another feature of the Act which appealed to the learned Judge was that s. 6 expressly provided for specification of goods for the grant of recognition of an association. If the Legislature so intended, a similar clause for specifying commodities could have found place in s. 14-A(1). It was held that forward contracts other than non-transferable specific delivery contracts in various commodities were covered by ss. 15 and 17 while s. 18 authorises the Central Government to control and regulate non-transferable specific delivery contracts and so since such a power is not contained in the express terms of s. 14-A(1) no necessary intendment has been proved to warrant its implication from the other provisions of the Act. Ultimately, the writ petition was allowed. The second condition contained in the certificate of registration as well as the direction issued on June 2, 1964, were quashed and the Commission was restrained from taking any proceedings against the respondent company consequent upon the supposed contravention in respect of the said condition and direction.

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Aggrieved, the Union of India as well as the Commission have come up in appeal. During the pendency of the appeal this problem was raised before the Delhi High Court in Civil Writ No. 360 of 1967 (*Messrs. Rajdhandi Grains and Jaggery Exchange Ltd. v. Union of India*). A learned single Judge of that Court accepted the views expressed in the judgment under appeal before us and held that the Commission had no such power. This judgment dated July 27, 1967, was affirmed by a Division Bench of the Delhi High Court in Letters Patent Appeal No. 7 of 1968 decided on August 4, 1972.

A perusal of the judgment under appeal shows that the learned counsel for the parties concentrated their attention on s 14-A for their respective contentions. This is what happened also at the hearing of the appeal before us. We, however, felt that there were other provisions in the Act which were germane to the question of powers possessed by the Commission. We posted the appeal for further hearing and heard learned counsel again.

In order to appreciate the inter-connection of the various provisions of the Forward Contracts (Regulation) Act, 1952, it may be useful to keep in mind its legislative history. The Statement of Objects and Reasons appended to this Act stated that forward trading which normally plays a useful part in tempering price fluctuations, tends in certain situations to exaggerate such fluctuations to the detriment of the interests of producers as well as consumers. During the war and immediately thereafter, the Central Government issued orders under r. 81 of the Defence of India Rules, prohibiting forward trading in commodities such as foodgrains, oilseeds, oilcakes, vegetable oils, raw cotton, spices, sugar

and bullion. After the Defence of India Rules lapsed, orders in respect of foodgrains, edible oilseeds and oils, raw cotton and spices were kept in force under the Essential Supplies (Temporary Powers) Act, 1946. Before the lapse of the Essential Supplies (Temporary Powers) Act, Parliament enacted the Forward Contracts (Regulation) Act, 1952. The scheme of this Act was that the Central Government was authorised to extend the provisions of the Act by notification to different classes of goods and to different areas as and when necessary. The main principle underlying the provisions of the Act was that forward contracts should be allowed to be entered into only in accordance with the rules and bye-laws of a recognised association. The Central Government was to exercise supervisory powers over such associations. The Act constituted a Forward Markets Commission and entrusted a variety of functions, duties and powers upon it.

After about six years working of this Act it was felt that its provisions were not adequate to deal with excessive speculation and other malpractices now prevalent in the forward markets. Persons indulging in illegal forward trading cannot be prosecuted for want of adequate documentary evidence. With this object Parliament enacted the Amending Act 62 of 1960, *inter alia*, introducing s. 14-A in the Act. Under this provision no association concerned with the regulation and control of business relating to forward contracts could carry on such business except in accordance with the conditions of a certificate of registration granted by the Forward Markets Commission. Under it the Commission was authorised to issue a certificate of registration to the existing recognised associations as well as others who applied for it, and to lay down the conditions for carrying on the business of regulation and control of business relating to forward contracts.

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S 3 of the Act authorised the Central Government to establish the Forward Markets Commission for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under the Act. The Commission was a high powered body consisting of not less than two but not more than four members to be appointed by the Central Government. The members to be so appointed were to be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to commerce or commodity markets, or in administration or who have special knowledge or practical experience in any matter which renders them suitable for appointment on the Commission.

S 4-A related to the nature of the Commission. Under it the Commission had the powers of a Civil Court under the Code of Civil Procedure in the matter of summoning and enforcing the attendance of witnesses, discovery and production of documents, requisitioning any public record or any other matter which may be prescribed by Rules. Under sub-s. (3) of s. 4-A the Commission was deemed to be a Civil Court and under sub-s. (4) any proceeding before the Commission is to be deemed to be a judicial proceeding within meaning of ss. 193 and 228 of the Indian Penal Code.

S. 4 provided for the functions of the Commission. It stated:

- “The functions of the Commission shall be—
- (a) to advise the Central Government in respect of the recognition of, or the withdrawal of recognition from, any association or in respect of any other matter arising out of the administration of this Act;
 - (b) to keep forward markets under observation and to take such action in relation to them as it may consider necessary in exercise of the powers assigned to it by or under this Act;

(c) to collect and whenever the Commission thinks it necessary publish information regarding the trading conditions in respect of goods to which any of the provisions of this Act is made applicable, including information regarding supply, demand and prices, and to submit to the Central Government periodical reports on the operation of this Act and on the working of the forward markets relating to such goods;

(d) to make recommendations generally with a view to improving the organisation and working of forward markets;

(e) to undertake the inspection of the accounts and other documents of any recognised association or registered association or any member of such association whenever it considers it necessary; and

(f) to perform such other duties and exercise such other powers as may be assigned to the Commission by or under this Act, or as may be prescribed."

It will be seen that like s. 3, cl (f) of s. 4 contemplated that duties and powers may be assigned to the Commission in various ways, namely either by the Act or under the Act or as may be prescribed. The term "prescribed" has been defined by s. 2(h) to mean prescribed by rules made under this Act. S. 28 of the Act conferred power upon the Central Government to make rules for the purpose of, *inter alia*, carrying into effect the objects of this Act.

Dealing with the phrase "by or under this Act or as may be prescribed" under cl. (f) of s. 4, the Supreme Court in *I. P. Gupta v W. R. Natu* (1) held that the expression "conferred by the Act" would mean conferred expressly or by necessary implication by the Act itself, while "under the Act" refers to powers conferred by bye-

(1) A.I.R. 1983 S.C. 274.

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laws that may be framed under ss 11 and 12, whereas the expression "as may be prescribed" refers to the rules that may be made by the Central Government.

Construing cl. (f) of s. 4 the Supreme Court held that so far as the terms of cl. (f) of s. 4 are concerned, there is no limitation upon the nature of the power that might be conferred except that which might flow from its having to be one in relation to the regulation of forward trading in goods which the Act is designed to effectuate. It was also held that there is no common positive thread running through cls. (a) to (e) of the section such as would bring them under one genus and negatively they do not expressly include any administrative or executive functions and that itself might be a reason why the expression "other" occurring in cl. (f) should receive the construction that it is intended to comprehend such a function.

The Court observed that where the Court is concerned with the question whether it is legally competent to vest a particular power in a statutory body, the proper rule of interpretation would be that unless the nature of the power is such as is incompatible with the purpose for which the body is created, or unless the particular power is contra-indicated by any specific provision of the enactment bringing the body into existence, any power which would further the provisions of the Act could be legally conferred on it.

In the light of these principles we have to see as to what powers have been conferred upon the Commission either by the Act or by the bye-laws or rules and then to see whether any particular power furthers the objects of the Act or is contra-indicated by any specific provision of this Act.

In exercise of its rule-making power the Central Government framed the Forward Markets (Regulation)

Rules, 1954. R. 2 defined the term "form" to mean a form appended to the rules. R. 3-A stated that an application under s. 14-A of the Act for registration of an association shall be made in triplicate in Form D to the Forward Markets Commission. R. 7-A provided that the certificate of registration granted to an association under s. 14-A shall be in Form E and the certificate of registration granted to an association under s. 14-B shall be in Form F. It also stated that in each case the certificate shall incorporate the conditions, if any, subject to which it is granted. Form D (meant for an application for registration) provided for specification of the goods or classes of goods in respect of which the applicant-association was concerned with the regulation and control of business relating to forward contracts. The annexure to this form required the applicant to answer 37 questions mentioned in it dealing with, *inter alia*, membership, Board of Management and various aspects of its dealings in forward contracts including the commodities in which it regulated forward contracts. Form F provided for the certificate of registration. Para 2 thereof stated :

"The registration hereby granted is subject to the condition (i) that the said association shall comply with such directions as may from time to time be given by the Forward Markets Commission and (ii) that the said association shall not conduct forward trading in any commodity other than those specified hereunder except with the previous approval of the Forward Markets Commission."

Condition no 2 read with r 7-A (under which the certificate was to incorporate the conditions subject to which it was granted) read with s. 4(f) and s. 3 clearly conferred statutory power upon the Commission to specify the commodities in the certificate of registration

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 and to require the association not to conduct forward trading in any other commodity except with the previous approval of the Commission. As observed by the Supreme Court in *I. P. Gupta's* case (1), the Forward Markets Commission was competent to receive powers given by the rules.

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 The object of the Act was to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. It was urged that the impugned power does not regulate forward contracts but it totally prohibits the registered association from carrying on business in forward trading in any other commodity except with the previous approval of the Commission.

Licences or permits are well recognised forms of regulating the conduct of trade or business. Cl 3 of the Cotton Textiles (Control of Movement) Order, 1948, provided for a citizen to take a permit from the Textile Commissioner for transporting cotton textiles. In *Harishankar Bagla v M P State* (2) the Supreme Court held that this provision did not deprive the citizen of his right to dispose of or transport cotton textiles purchased by him. Such a requirement was only a restriction which was reasonable within meaning of Art. 19 (1)(f) and (g) of the Constitution. Similarly, in *P. V Sivarajan v. The Union of India* (3) the power to prohibit trade in coir industry except under a permit or licence was held to be regulation of the coir industry. So the requirement of a previous permission before business could be carried on is well within the significance of the term "regulation". It is at best a restriction upon the right to carry on business, and not a total prohibition. It has not been disputed that the regulation of forward contracts is in the interest of the public within

(1) A.I.R. 1968 S.C. 274

(2) A.I.R. 1954 S.C. 485.

(3) A.I.R. 1959 S.C. 556

meaning of Art. 19 of the Constitution. It cannot hence be said that the requirement of obtaining previous approval of the Commission in any way violates the fundamental rights guaranteed by Art. 19(1)(f) and (g) of the Constitution. It cannot therefore be said that the conferment of such a power is contra-indicated by Art 19 of the Constitution. In this connection it may be noticed that the respondent company, a juristic personality, is not possessed of any fundamental right under Art 19(1)(f) and (g) of the Constitution. This has been settled by the Supreme Court in several decisions [*State Trading Corporation v C T O* (1), *Swadeshi Cotton Mills v S T. O* (2)] The respondent company cannot also complain that the Commission could not validly be the recipient of such a power in relation to it, because it furthers the object of the Act, to regulate forward trading in goods and commodities

The learned single Judge held that such a power could not be implied from s. 14-A(1) of the Act. Since the power has been expressly conferred by s. 4(f) read with the rules, it is not necessary to find the same power in s 14-A(1). Of course, the position would be different if s 14-A(1) contra-indicates the conferment of such a power. So the proper approach to s 14-A should be to see whether it contra-indicates it.

S 14-A(1) provides:

“No association concerned with the regulation and control of business relating to forward contracts shall, after the commencement of the Forward Contracts (Regulation) Amendment Act, 1960 (hereinafter referred to as such commencement), carry on such business except under, and in accordance with, the conditions of a certificate or registration granted under this Act by the Commission.”

(1) AIR 1968 SC 1811

(2) AIR. 1965 All 86

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This provision contemplates that the Commission can lay down conditions in the certificate of registration; and in accordance with such conditions, the association can carry on the business of regulation and control of business relating to forward contracts. The learned single Judge held that the conditions must be such as are related to the carrying on of the business. It is the conduct of the business and the manner of conducting it to which reference is made here. Specification of the commodities in which alone business may be carried on would not relate to the conduct of the business or the manner of its being carried on. That would entail the curtailment of the business.

As already seen, prohibiting the carrying on of a business except under a permit or licence previously obtained, is regulation and not curtailment in the sense of total prohibition. It may be a restriction upon the right to carry on business, but 'condition' has been defined to mean a qualification, restriction or limitation modifying or destroying the original act with which it is connected; (see *Bouvier's Law Dictionary*, page 203) S. 14-A clearly contemplates the placing of restrictions or qualifications upon the carrying on of such business.

"Carry on" is a phrase of the widest amplitude. In *Enichsen v Last* (1), JESSEL, M R. said:

"There is no principle of law which decides what 'carrying on' trade is a multitude of circumstances make up what is called 'carrying on' a trade; for it is a compound fact made up of a variety of things "

All facts of activities involved or engaged in, in order to subserve or achieve the purpose of the business, would be within the concept of 'carrying on' the business. Entering into transactions for regulating the transactions of buying and selling in particular commodities by the

(1) 8 Q B D 414.

members of the association, would be the association's carrying on of its business. The commodities in which the activities of the association are engaged, would be an integral part of the carrying on of its business. The commodities in which business is carried on cannot be divorced from the carrying on of its business. The decision of the House of Lords in *South Behar Railway Co. Ltd. v. Commissioners of Inland Revenue* (1) is apposite in this connection. In that case the Railway Company under a contract with the Secretary of State for India was to find the money and material for the construction of the railway. The Secretary of State was to work and maintain the railway and to pay a share of the gross receipts of the railway to the company. He could determine the contract on twelve months notice and become the owner of the railway. By a supplementary contract it was agreed that in consideration for the company relinquishing the railway to the Secretary of State, it would receive a fixed annuity from the latter in lieu of the percentage of earnings payable under the principal contract. Since the supplementary contract, the only business of the company was to receive annuity and to declare dividends. It was held that though the company can no longer be called upon to fulfil its first purpose namely to make advances for the construction of the line, because all the necessary funds have been already advanced, but it is still fulfilling its second purpose which was to receive an income for its shareholders, while the line was running and to distribute it among them, and while this was happening the company still carried on business.

If one were to ask what business the association is carrying on, the answer would naturally be, the business contemplated by its Memorandum and Articles of Asso-

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(1) 1925 AC, 476.

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citation. If they be read, it is clear that the respondent was entitled to do business in various commodities. Its doing business in them was carrying on its business. The commodities were the subject-matter or media for the carrying on of business. The specification of the commodities in which the business of regulation and control of forward contracts could be carried on would be a condition under and in accordance with which such business could be carried on.

In our opinion, s 14-A does not contra-indicate the conferment of such a power upon the Commission. When it authorises the Commission to lay down the conditions, it clearly contemplates a condition of the kind impugned in the present case.

It was urged that if the Legislature intended to confer on the Commission power to specify commodities, one would have expected a clause in s 14-A like the one mentioned in s 6. S 6 provides for recognition of associations. Under it the Central Government is to grant recognition in such form and subject to such conditions as may be prescribed and is to specify in such recognition the goods or classes of goods. It is true that there is an express provision for specification of goods in s. 6; but no principle of law says that a Legislature must confer power though of the same kind, but upon different institutions, in the same language or in the same form. S. 6 confers power on the Central Government while the Legislature in its wisdom left the discretion to confer similar powers to the Commission upon the Central Government, through its rule-making power. The different mode in which power is conferred cannot by itself negative the existence of power.

It was urged that the Forward Markets Commission was the creature of the Central Government and subordinate to it. It should not be impliedly held to possess

co-ordinate powers with the Central Government. In this connection reference was made to the various regulatory powers conferred on the Central Government by ss. 15 to 19 of the Act. There is, in our opinion, neither duplication of power nor creation of a parallel body. The Commission is subordinate to the Central Government. Under ss. 15 to 18 the Central Government by notification regulates forward contracts in specified commodities and in specified areas. Under those provisions the Central Government does not deal directly with individual associations. The powers of the Commission, on the other hand, relate to individual associations, and neither to commodities nor to areas, in general.

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It was submitted that the power conferred on the Commission is unrestrained. The Commission may in exercise of its powers prohibit an association to conduct its business in a commodity which is not prohibited by the Central Government under its regulatory powers. If the Commission does so, its individual orders may be liable to be questioned. The Commission is a high powered body of experts. All its proceedings are judicial. It is deemed to be a civil court. It is obvious that it is plainly ordained to pass orders on objective considerations, in the light of various other provisions of the Act. The possibility of an individual order being illegal on any such ground will not be relevant and material while considering whether the power exists.

Learned counsel for the company urged that cl. (f) of s. 4 should be read *ejusdem generis* with its other provisions, and so read it contemplates conferment of powers in relation to matters mentioned in cls. (a) to (e). This submission stands repelled by the decision of the Supreme Court in *I. P. Gupta's* case (1) where the Supreme Court held that there is no common positive

(1) A.I.R. 1968 S.C. 274.

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thread running through cls (a) to (e) such as would bring them under one genus. The rule of *ejusdem generis* cannot apply.

It was also submitted that the form appended to the rules framed under the Act cannot enlarge the scope of powers conferred by s. 14-A(1). There is no such general rule or principle of law. If the provisions of the Act specifically authorised the rules to confer powers, the same can be done, validly. The decision in *Sarveswara Rao v. Umamaheswara Rao* (1) is not applicable. There it was held that the provisions of s. 3 of Act 4 of 1938 are perfectly plain and it is impossible to read them as if the criterion for the exclusion was the actual period for which the tax was payable and not the time within which the assessment was made. In that context it was held that the meaning of the Act cannot be derived from the forms prescribed under the rule-making power. Obviously, the matter referred to in s. 3 was not one for which the rules could prescribe anything.

The condition no. 2 mentioned in the certificate of registration of the respondent company was valid. The directive issued by the Commission on June 2, 1964, was within its powers. The respondent was not entitled to any relief.

In the result, the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed with costs.

Special Appeal allowed.

(1) A.I.R. 1941 Mad. 152.

APPELLATE CIVIL

Before Mr. Justice A. K. Kirty

BRIJ BHUSHAN MITTAL

... APPELLANT,

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MANNOO LAL MITTAL AND OTHERS

. . . RESPONDENTS.

Court Fees Act, s. 7(iv-A)—*Instrument by a Benamidar in favour of the real owner—Not a release deed—Nor a instrument securing property*

When a *benamidar* executes a document declaring that he is a *benamidar* for a person, he merely acknowledges or admits openly and publicly a fact, viz that that person alone acquired title, ownership and interest in the property in question. He does not release or relinquish any title, interest or claim. Legally he had none. Such a document will not come within the mischief of s 7(iv-A) of the Act or the expression "instrument securing property".

F A. F. O. no. 33 of 1971 against the judgment and decree passed by S. P. SRIVASTAVA, Civil Judge, Jhansi, dated 30th September, 1969 in suit no. 12 of 1967.

S N. Verma, for the Appellant.

K C. Agarwal, for the Opposite-parties.

A K. KIRTY, J.:—This is an appeal under s. 6-A of the Court Fees Act (hereinafter called the Act).

The plaintiff his two brothers (defendants nos 1 and 3) and their father Piarey Lal constituted a Hindu Joint Family. Piarey Lal died on 9-3-1966; whence, the share of each his sons in the coparcenary property became 1/3rd by survivorship. Piarey Lal in his capacity as the Karta of the family had purchased two bungalows with joint family funds. The bungalows belonged to the joint family. Shortly before filing the suit the plaintiff came to know that taking undue advantage of Piarey Lal's old age and mental and physical infirmity, defen-

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dant no. 1 in collusion with defendant no. 3 had managed to get a deed dated 24-10-1945 executed by Piarey Lal transferring the bungalows in question to his wife, defendant no. 2. The said deed is void and no title passed to defendant no. 2 thereunder; nor is the plaintiff in any way bound by the same. Upon these allegations, the plaintiff-appellant filed the suit for partition and separate possession of his 1/3rd share in the bungalows.

Defendants nos. 1 and 2 denied the plaintiff's claim and asserted that the bungalows were in reality purchased by defendant no. 2 herself with her own funds, but *benami* in Piarey Lal's name and never belonged to or were possessed by the coparcenery. In order to avoid any dispute in future Piarey Lal subsequently executed the deed, dated 24th October, 1945, honestly and truthfully acknowledging and admitting the real facts. It was also pleaded that defendant no. 1 was living separately from his father and brothers since, 1927. It was further pleaded that the suit was undervalued and that the plaintiff had not included in the plaint some other property, which was the only property of the family.

The plaintiff amended the plaint by including another property and valuing the bungalows at the market value as determined by the court on the basis of the report of the commissioner appointed by it. The plaintiff thereafter paid additional court-fees, and there is no dispute that the total court-fee of Rs.1,307.50 paid by the plaintiff is adequate for the relief of partition of the bungalows and the other subsequently included property.

Objections, however, were raised by the Chief Inspector of Stamps as also by the Munsarim of the Court, to the effect that the suit involves adjudging void or voidable the deed, dated 24th October, 1945, which is an instrument securing property and that, therefore, the

plaintiff is liable to pay *ad volorem* court-fee under s. 7(iv-A) of the Act separately on Rs.27,975.75, being 1/5th of the market value of the two bungalows. These reports were contested by the plaintiff; but the court below has upheld the same and has ordered him to pay further court-fee of Rs 2,507 50. The deed, dated 24th October, 1945 has been treated as a deed of release by the court below. The plaintiff by this appeal challenges the correctness of the order of the trial court and his liability to pay additional court-fee under s. 7(iv-A) of the Act

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S 7(iv-A) of the Act (omitting the portions not relevant for purposes of this case) provides as follows:

S. 7. "Computation of fees payable in certain suits,—

The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows—

.....

(iv-A) For cancellation or adjudging void instruments and decrees.

In suits for or involving cancellation of or adjudging void or voidable . . . an instrument securing money or other property having such value (market value)"

The points for determination may be formulated thus:

(1) Whether the suit involves adjudging void the deed, dated 24-10-1945;

(2) whether the deed is an instrument securing the property (viz the two bungalows),

(3) whether, in case the above questions are answered in the affirmative, court-fees will be payable separately under s 7(iv-A) and s. 7(vi-A) both or only on the consolidated amount of all the reliefs.

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I shall deal with these points in seriatim.

In the plaint the only relief claimed is for partition of the bungalows upon the averment that they are and at all material times were coparcenary property. The suit clearly is not a suit for adjudging void or voidable the deed, which, it is not disputed, is an instrument. So the question is: Does the suit involve any such adjudgment? It has been argued by *Sri Verma* learned counsel for the appellant that the Act being a taxing statute, s. 7(iv-A) thereof, which casts a very heavy and onerous burden on a litigant, must be strictly construed; and the word "involving" occurring therein must not be given any liberal connotation. According to him, s. 7(iv-A) cannot be attracted unless the particular suit necessarily and directly involves, *i.e.*, calls for, an adjudication as to whether an instrument of the specified category is void or voidable. The test should be whether such an adjudication would be a condition precedent or an essential pre-requisite to the grant of the relief sought by the plaintiff. If, however, any such question arises incidently or collaterally or by way of a 'side-issue', s. 7(iv-A) will not be attracted. On the other hand, the learned Standing Counsel has contended that the section should be literally construed and since the word 'involve' itself is a word of wide import, it must be held to have been advisedly used by the Legislature connoting its ordinary and natural meaning.

I am inclined to agree with the above contention of the learned Standing Counsel that the word "involving" occurring in s. 7(iv-A) of the Act has to be read and construed in the light of the ordinary dictionary meaning of the verb 'involve'. There is nothing in the context to show nor any special reason has been shown why the normal rule of construction should be departed from. Indeed, the legislative history and background would also show that the Legislature deliberately used

the expression because the word 'involve' itself is not a word which signifies, nor is normally used as signifying something specific, categorical or ascertained but is a word which inherently carries with it a signification of wide and undefined amplitude. I, however, do not consider it necessary to deal with this matter more fully or further because, in my opinion, the appellant is entitled to succeed on the second point.

The court below has treated the deed, dated 24th October, 1945 to be a 'deed of release' and on that basis has held the plaintiff to be liable to pay court fee under s. 7(iv-A) separately. In my view, the document is not a deed of release nor it secures the property, i.e. the two bungalows. According to the plaintiff, the bungalows were purchased by his father Piarey Lal with joint family funds in his capacity as the Karta of the family and they were and throughout remained coparcenary bungalows. According to the plaintiff, the bungalows assert that Piarey Lal was merely a *benamidar* for defendant no. 2, who was the real purchaser and had paid the entire consideration from her own funds. It is true that the plaintiff's suit for partition of the bungalows cannot succeed if it is established that Piarey Lal was merely a nominal purchaser, the real purchaser being defendant no. 2; but if it is not established that Piarey Lal was a *benamidar* for defendant no. 2, the document, dated 24th October, 1945 will be of no consequence at all. Equally, it will be of no consequence if, on the other hand, it is proved that defendant no. 2 was the real purchaser and Piarey Lal was merely her *benamidar*. The document in question is not a deed of conveyance nor transfers title or any interest in the property to defendant no. 2. By it Piarey Lal did not release or relinquish any right or claim to the property or some interest therein. Such a document, in pith and substance, evidences an admission and acknowledgment and, therefore,

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may be a valuable piece of evidence, but it does not legally secure any property.

A Full Bench of this Court in *Smt. Bibbi v Shugan Chand* (1), has held that a sale-deed is "an instrument securing property" within the meaning of s. 7(iv-A) and has observed that the only sense in which an instrument may be regarded as securing immovable property is that it makes the title thereto or its possession and enjoyment safe or certain. It has further observed that a sale-deed 'assures' in the most effective manner the divesting of the title of the transferor in a property and the vesting of that title in the transferee, and where the sale of a property can take place only by means of a deed it is the sale-deed alone that 'assures' the extinction of the transferor's interest and the acquisition of that interest by the transferee. GANGESHWAR PD, J, who delivered the judgment of the Bench, referred to and drew support from—

(1) *Smt. Kamala Devi v. Sunni Central Board of Waqfs* (A. I. R. 1949 All 63).

(2) *J. Balireddi v. Khatipulal Sab* (A. I. R. 1935 Mad. 863).

(3) *K. Kutumba Sastri v. L. Bala Tripura Sundaramma* (A. I. R. 1939 Mad. 642 F. B.).

(4) *Ram Kumar v. Damodar Das* (A. I. R. 1949 All. 535).

(5) *Udai Pratap Gır v. Shanta Devi* (A. I. R. 1956 All. 492).

in arriving at the conclusion that a sale-deed is such an instrument. The learned Judges overruled *Chief Inspector of Stamps v. Jashpal Singh* (2) in which a contrary view was taken by a Division Bench. The instruments considered in these cases were either sale-deeds or Waqf-namas or wills by means of which ownership or proprie-

(1) A.I.R. 1968 All. 216 (F.B.).

(2) A.I.R. 1956 All. 168.

tary title was conveyed or conferred. In the instant case, as already indicated, the deed is not a deed of release nor it is a deed of relinquishment; for release and relinquishment both postulate some right, interest or claim of the executant in or to the particular property which he foregoes or gives up for the benefit of the person or persons in whose favour he executes the deed. A *benamidar* has no right, title or interest in the property of which he is merely nominal owner, the real owner being someone else. This is the legal position as between the *benamidar* and the real owner. Therefore, when a *benamidar* executes a document declaring that he is a *benamidar* for a person, he merely acknowledges or admits openly and publicly a fact, viz. that that persons alone acquire title, ownership or interest in the property in question. He does not release or relinquish any title, interest or claim. Legally he had none. Such a document, in my opinion, will not come within the mischief of s. 7(iv-A) of the Act or the expression "instrument securing property." I have come across only one reported decision in which a deed of release has been held to be "an instrument securing money". In *Doraiswami Reddiar v. Thangavelu Mudaliar* (1), however, by the document in question the rights of the plaintiffs in a partnership and its property had been transferred to the defendants for consideration. The learned Judge, who decided the case, was of opinion, and; if I may respectfully say so, very rightly, that the document did not materially differ from a sale-deed. The document, in the instant case, is not for consideration nor transfers any property nor secures any property. The plaintiff, therefore, could not be held liable to pay any court-fee under s. 7(iv-A).

In view of the above finding the third point has become merely academic. It need not, therefore, be de-

(1) A.I.R. 1929 Mad. 668.

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cided. I may, however, all the same mention that under more or less similar circumstances this Court in a number of cases has held that court-fees would be payable on the consolidated amount of the two reliefs and not separately for each relief [See *Chief Inspector of Stamps v. Suraj Karan* (1); *Mt. Jileba v. Mt. Parmesra* (2); and *Suraj Prasad v. Jagarnath Prasad* (3)].

In the result the appeal succeeds and is allowed. The order of the court below requiring the plaintiff to pay additional court-fee of Rs.2,507.50 is set aside. The parties shall bear their own costs.

Appeal allowed.

CIVIL MISCELLANEOUS

*Before Mr. Justice S. Chandra and Mr. Justice
 N. D. Ojha*

1972
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BHARIT AND OTHERS ... PETITIONERS,
 - v.

BOARD OF REVENUE AND OTHERS

... OPPOSITE-PARTIES.

U. P. Zamindari Abolition and Land Reforms Act, 1950, s. 209—Transfer of occupancy tenancy—Possession of the transferee—Nature of—Adverse to transferor—Not permissible.

If the document of sale is invalid the transferee gets no title under it. His possession will not be referable to any legal title; it would be adverse to the transferor.

Held, that the possession of transferee from the date of the transfer of occupancy tenancy was adverse to the transferor and was not permissive on behalf of the latter.

Writ Petition no. 3017 of 1969.

Bhuneshwar Pd., for the Petitioner.

(1) A I R. 1949 All. 170.

(2) A.I.R. 1949 All. 641.

(3) A.I.R. 1955 All. 319.

K. P. Singh, R. N. Singh and S. C., for the Opposite-parties

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S. CHANDRA, J.:—A learned single Judge has referred the following two questions of law to a larger Bench:

“(1) Whether on the facts and in the circumstances of this case, the possession of Jagan from the date of the transfer of occupancy tenancy in his favour would be permissive on behalf of the transferor or adverse to his interests?

(2) In case the possession of the original transferee was permissive in its nature will the possession of his heirs subsequent to his death continue to be permissive or will it become adverse to the rights of the original transferor?”

The writ petition in which the reference has been made arose out of a suit for ejectment and possession under s. 209 of the U. P. Zamindari Abolition and Land Reforms Act filed by the respondents. The plaintiff respondents claimed to be occupancy tenants of the plots in dispute. On 18th October, 1948 they executed a deed of sale of their rights in the plots in dispute in favour of one Jagan, the father of the petitioners. The plaintiff-respondents' case was that the sale of occupancy being prohibited by law the sale was illegal; but nonetheless the possession of the transferees was permissive and as a licensee. The licence having been revoked, the transferees were no longer entitled to remain in possession. The present suit was instituted against the sons of Jagan after his death, in 1956.

The trial court dismissed the suit. On appeal it was, however, decreed. The appellate decree was affirmed by the Board of Revenue. The Board of Revenue has relied upon a single Judge decision of this Court in *Chidda v. Joint Director of Consolidation* (1) and has held that the sale was illegal because the transfer of

(1) 1968 R.D. 205.

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occupancy tenancy was prohibited, yet the possession of the transferees amounted to a permissive possession and on behalf of the transferor or tenants. Their possession being as licensees, the said licence stood revoked by the institution of the suit and consequently the transferees were trespassers after the revocation of the licence.

At the hearing of the writ petition before the learned single Judge reliance was placed on behalf of the petitioners on a certain decision of the Supreme Court which in the opinion of the learned single Judge cast doubt on the validity of the view taken in *Chidda's* case (1). He consequently referred the two questions mentioned above to a larger Bench. This is how the petition has come up before this Bench.

In *Chidda's* case (1) a tenant co-opted Chidda as a co-tenant. Shortly thereafter he executed a sale-deed in favour of Chidda transferring his remaining interest in the tenancy plots. On these acts the learned Judge held:

"It will be seen that the petitioners entered into possession, if at all, with the permission of the landlord Chandrika Prasad and Kunwar Sen, the tenant-in-chief in the year 1948 under a written agreement. The petitioners' possession over the other half of the tenancy was by reason of the fact that he purported to have purchased the same from Kunwar Sen under a sale-deed. *Mr. Kazmi* has not been able to cite any authority before me to show as to how in these circumstances the possession of his client could be said to be adverse."

The learned Judge proceeded to hold:

"Ordinarily when a person enters into possession under an instrument of transfer which is subsequently found to be invalid, then the title remains

(1) 1968 R.D. 205.

with the transferor, even though the possession might be of the transferee, but such a possession would in law be a permissive possession being on behalf of the transferor. It cannot be said to be adverse to the transferor."

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In our opinion this decision does not lay down the law correctly. A similar question arose before the Supreme Court in *Collector of Bombay v. Municipal Corporation of the City of Bombay* (1) The Court observed:

"... the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was *prima facie* adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent corporation has acquired the limited title to what it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of market in terms of the Government Resolution of 1885"

This view of the Supreme Court was affirmed by it in *State of West Bengal v. The Dalhousie Institute Society* (2) where it was held that the above extract established that a person in possession under an invalid grant acquired title by adverse possession.

(1) A.I.R. 1951 S.C. 469.

(2) A.I.R. 1970 S.C. 1778.

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The reason is not far to seek. If a person executes a deed of sale of his rights and interest he purports to transfer all that he possesses in the property which is the subject-matter of the sale. The transferee claimed *prima facie* to remain in possession in accordance with the terms of the deed of sale, namely, as the full owner of the rights which were the subject-matter of transfer. In case the sale is found to be invalid for any reason the passing of the title may be frustrated; but nonetheless the transferee claimed to remain in possession in accordance with the terms of the invalid sale-deed, namely as the full owner of the rights in the plots, which were the subject-matter of sale. It is from this point of view that it has been said that the possession of such a transferee is adverse to the transferor from the very first day when the transferee enters possession of the land.

The possession of a transferee in the case of sale is not on behalf of the transferor, because the transferor has purported to part with his entire interest in the property. The transaction did not create or retain any privity between the parties. In such a situation, the transferee's possession could not in law, be on behalf of the transferor. The transferee remains in possession in his own claim based on the terms of the sale. If the document of sale is invalid the transferee gets no title under it. His possession will not be referable to any legal title; it would be adverse to the transferor.

In the present case the sale-deed was in respect of tenancy right. After the lapse of the two years prescribed period of limitation, the transferee acquired under s. 180(2) of the U. P. Tenancy Act, hereditary tenancy rights. In our opinion *Chidda's* case (1) in so far as it decided that Chidda's possession was permissive in relation to the portion which was the subject-matter of the sale does not lay down the law correctly.

(1) 1968 R D. 205.

We would answer the first question by saying that the possession of Jagan from the date of the transfer of occupancy tenancy was adverse to the transferor and was not permissive on behalf of the transferor.

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In view of our answer to the first question, question no. 2 does not arise and need not be answered. The papers may now be laid before the learned single Judge for the decision of the case on merits.

Questions answered.

APPELLATE CIVIL

*Before Mr. Justice A. K. Kirtu and Mr. Justice
C. D. Parekh*

SHYAM BEHARI LAL AND OTHERS

... APPELLANTS, 1972
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v.

GENERAL MANAGER AND OTHERS

... RESPONDENTS.

Indian Railway Establishment Manual, para. 216(J) and 217 (a) and (b)—Railway Selection Board—Candidate selected by such panel and approved by competent authority—Subsequent cancellation—Invalid.

Under para 216, no provisional list can be prepared. Once a selection is duly made by the Selection Board and the panel is approved by the competent authority, rights to the persons selected and put on panel accrue under cls. (a) and (b) of para 217.

Para 216(J) does not confer an absolute and uncontrolled power on the higher authority to cancel the selection and the panel of selected candidates.

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It cannot be said that para. 217 was framed for purposes of embellishment and not for the purpose of affording some rights on candidates who are declared to be successful at the selection examination and whose names are included in the panel as such.

Notification cancelling the panel of selected candidates held invalid.

Indian Railway Establishment Manual, para 216(J)—“*Other defects*”—*Higher authority when cannot cancel or amend a panel.*

The expression “other defects” even if given wide connotation would not confer on the higher authority power to cancel or amend a panel merely because he was personally of the view that the papers set by the Selection Board or the standard of giving marks to the examinees on examination of the answer books or at *viva voce* tests were very lenient.

Special Appeal no. 336 of 1971 from the judgment, dated 13th of May, 1971, passed by G. C. MATHUR, J. in Civil Miscellaneous Writ no. 1988 of 1971.

B. P. Srivastava, Triloki Nath and Shanti Bhushan, for the Appellants.

Lalji Sinha, for the Respondents.

KIRTY, J.:—The appellants are Railway servants. Admittedly, a Selection Board was set up for selecting candidates for promotion to posts of Signal Inspectors in the Scale Rs.450—575. It is not disputed that the appellants were eligible persons for being considered for selection for the posts in question. The appellants along with a number of certain other Railway servants appeared at the examinations held by the Selection Board and also at personal interviews held by that Board. The selections for the posts took place between December 18, 1969 and December 7, 1970. As a result of the selection proceedings, a panel of selected candidates, dated 24th December, 1970/18th January, 1971 was published in the Railway Gazette containing the names of the selected candidates. There is no dispute that the names of the appellants found place in that panel. Subsequently, the appellants were posted

in officiating capacity to posts for which selection was made by the Selection Board. The selection made by the Selection Board, under the relevant Railway rules, was subject to approval by the Chief Signal and Telecommunication Engineer. There is no dispute either that the said authority approved the panel prepared by the Selection Board and that it was thereafter that the panel was published in the Gazette. It appears that some complaints were made alleging that some irregularities had been committed by the Selection Board in preparing the panel of selected candidates. These complaints appear to have been made to the Railway Minister who in his turn referred the matter to the General Manager of the Railway concerned, namely, North Eastern Railway. The General Manager called for a report from the Chief Signal Telecommunication Engineer and cancelled the selection and the panel of the selected candidates. In pursuance of his order a notification to that effect was issued on March 23, 1971. This notification was challenged by the appellants by filing a petition in this Court under Art. 226 of the Constitution. This petition was opposed by the respondents. The petition was dismissed by a learned single Judge of this Court. Against his judgment and order, the instant special appeal has been filed.

The impugned notification, dated March 23, 1971 purports to have been issued or caused to be issued by the General Manager in exercise of power conferred on him by the newly-added cl. (J) to para. 216 of the Indian Railway Establishment Manual. The first question for determination is what is the power of General Manager under the aforesaid provision. Para. 216(J) reads as follows:

"After the competent authority has accepted the recommendations of Selection Board, the names

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of the candidates selected will be notified to the candidates. A panel once approved should normally not be cancelled or amended. If after the formation and announcement of the panel with the approval of the competent authority, it is found subsequently that there were *procedural irregularities or other defects* and it is considered necessary to cancel or amend such a panel, this should be done after obtaining the approval of authority next higher than the one that approved the panel."

In the instant case, the parties are agreed that the next higher authority than the one which approved the panel is General Manager of the particular Railway. The aforesaid provision empowers the next higher authority to cancel or amend a panel approved by the competent authority if it is discovered that there were procedural irregularities or other defects in the matter of selection of candidates by the Selection Board. Further, the panel can be cancelled or amended only if considered necessary. It has been contended before us by the learned counsel for the appellants, as was done before the learned single Judge, that the General Manager has no power to cancel or amend the panel prepared by the Selection Board and approved by the competent authority because there was neither any procedural irregularity nor was there any such defect in the matter of selection as would entitle the General Manager to cancel or amend it. It has not been denied by the learned counsel for the respondents that there was no procedural irregularity. It has, however, been contended that there were defects which would come within the ambit of the expression "other defects" under para. 216(J). On the other hand, the learned counsel for the appellants contended that "other defects" in the context would mean defects similar or analogous to procedural irregularities, that is to say, the argument was

that in construing the expression "other defects", the rule of *ejusdem generis* should be applied. We do not propose to express our final or concluded opinion on this controversy.

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In our view, the expression "other defects" even if given wide connotation would not confer on the higher authority power to cancel or amend a panel merely because he was personally of the view that the papers set by the Selection Board or the standard of giving marks to the examinees on examination of the answer books or at *viva voce* tests were very lenient. One of the explanations given on behalf of the General Manager in the counter-affidavit is that the papers which were set were too lenient. Another reason given is that one Shri M. L. Kanaujia who appeared in the selection examination and tests actually received more marks but less marks were shown against his name. Assuming that this allegation is correct, it might reasonably furnish a ground for suitably amending the panel but such a mistake obviously could not be made a ground for cancellation of the entire panel. Another ground mentioned is that one Shri N N Sharma whose name was included in the panel was not found suitable by another Selection Board in another selection for a different post. To our mind, this was wholly irrelevant to the question whether the panel prepared in the instant case should be cancelled or amended. It has not been alleged that Shri N. N. Sharma had not duly qualified at the written examination and the *viva voce* test held by the Selection Board. Besides, if individually some thing was wrong in regard to selection of Shri N. N. Sharma, that might again possibly furnish a reasonable ground to suitably amend the panel but not for the cancellation of the panel as a whole. Even if the matter were to be examined in the light of explanation given on behalf of

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the General Manager, the impugned notification cannot be upheld because the General Manager to our mind, acted upon considerations which were not relevant and which, in any case, had nothing to do with the present appellants or their selection. The learned counsel for the contesting respondents urged that the expression "other defects" was wide and comprehensive enough to empower the higher authority without any restriction to cancel the panel if the higher authority was satisfied that the panel, for some reasons which appealed to him, deserved to be cancelled or amended. We are not prepared to accept a proposition so widely stated because if such a proposition were to be accepted, the consequence might be to vest the higher authority under para 216(J) with an absolute, uncontrolled and unrestricted power to cancel or amend any panel even though prepared by the Board of Selection in due course and approved by the competent authority. The question, however, need not be discussed further.

The learned single Judge appears to have been greatly influenced by the fact that the panel which was prepared and approved was described as a panel, containing the names of candidates 'selected provisionally'. The relevant rules do not provide for preparing any such provisional panel as a whole or for all purposes. From the relevant rules it appears that for certain selection posts, the Railway servants who are otherwise eligible have a right to appear at examinations held by Selection Boards for selecting candidates for promotion to higher posts on selection. In the instant case, it is not denied that at the time of the examination or before holding the examination, it was not intimated to the candidates that the examination would be held merely on a provisional basis or that the panel would also be drawn up on a provisional basis. If this be the posi-

tion, it appears to us that neither the Selection Board nor the competent authority would have any right to subsequently prepare a panel mentioning that the panel consists of the names of persons selected only provisionally. It is another matter that when a panel is prepared, it may contain the names of some individuals included therein provisionally because of some special reasons. An example of such special reasons is indeed furnished by the materials on the record before us. It appears that one of the persons whose name was included in the panel had duly qualified but against him some disciplinary proceedings were going on and it was not possible to anticipate or prejudge what the ultimate result of those proceedings might be. In the circumstances, the name of that person was rightly included in the panel on provisional basis.

There is another reason why, to our mind, the relevant rules cannot be held to permit normally and in ordinary course preparation of mere provisional lists, i.e. panels which may at any time be cancelled or amended without showing any specific reason therefor. The Railway Establishment Manual itself contains para 217. Cls. (a) and (b) thereof provide as follows:

“(a) Panels drawn by a Selection Board and approved by the competent authority shall be current for two years from the date of approval by the competent authority or till these are exhausted whichever is earlier.

“(b) An employee who once officiates against a non-fortuitous vacancy in his turn on the panel shall not be required to appear again for fresh selection.”

Para. 217 above itself, to our mind, furnishes a good ground for holding that under para 216, no provisional list can be prepared once a selection is duly made by

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the Selection Board, because when a selection is made and the panel prepared is approved by the competent authority, rights to the persons selected and put on the panel accrue under cls. (a) and (b) of para 217. Those rights may be of a limited character, even so, it is not possible to hold that para 217 does not confer any right at all to persons who have been selected and whose names have been placed in the approved panel. If para 217 did not or was not intended to afford any protection to or confer any right on the persons concerned and if by para 216(J) it was intended to confer an absolute and uncontrolled power on the higher authority than merely at the option of the higher authority, some persons could be required to appear at several successive selections by Selection Board by just cancelling or amending the panels prepared earlier. Obviously, it could never have been the intention of the authority which framed para 216(J) to confer such unfettered power on the higher authority nor could it be said that para 217 was framed merely for purposes of embellishment and not for the purpose of affording safe-guard to or conferring some right on candidates who are declared to be successful at the selection examination and whose names are included in the panel as such. We are, therefore, of the opinion that the validity of the impugned notification, dated March 23, 1971 cannot be upheld.

In his attempt to show that the impugned notification was valid, learned counsel for the contesting respondents urged that in the absence of any specific bar to that effect, it would be open to the Selection Board as also to the competent authority to hold selection examinations provisionally, to prepare selection lists provisionally and to give approvals provisionally. We do not find any reasonable basis upon which such an argument can be accepted. If certain posts are selection posts and the procedure for recruitment to those

posts is by selection from a lower cadre by Selection Boards constituted in that behalf then obviously that is a matter which directly concerns the rights of those employees in the lower cadre who may be eligible for promotion on selection, and, therefore, it cannot be held that the Selection Board will have a right to make selections at its option either on a mere provisional basis or on a permanent or final basis. It is only when for any extraordinary or special reason, a certain number of vacancies have to be filled on *ad hoc* basis or as a purely temporary measure that provisional selections can be made. Otherwise in the normal course, selections have got to be made with a view to promote eligible persons from the lower cadre who qualify for appointment to posts in the next higher cadre. We are unable to accept the contention that since there is no specific bar in the Railway Establishment Manual, the Selection Boards must be deemed to have power to make provisional selections as and when they like. The learned counsel in support of his argument sought to derive support from certain observations made by the Supreme Court in *Shitla Sahai Srivastava v. General Manager, N. E. R., Gorakhpur* (1). In that case, however, the entire panel was not a provisional one but in that panel the names of five persons were included on provisional basis. We have already stated above that, in our opinion, the names of individual persons for any special or extraordinary reason may be included provisionally. Such reason is necessarily something personal to the particular person or persons. For such a reason or reasons, the other candidates against whom or in respect of whom no such reason exists cannot be treated equally and cannot be included in the panel merely on a provisional basis. There is nothing in the judgment of the Supreme Court in the aforesaid case on the basis of which the impugned notification can be upheld.

(1) A I R. 1966 S.C. 119.

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Learned counsel for the respondents further urged that, as would appear from Ann A-2 to the writ petition, the appellants were appointed in officiating capacity only. His argument was that if a person is appointed in an officiating capacity to a higher post then that person does not acquire any right to such post nor does he acquire any lien thereon. He further submitted that in such a case there is no question of any reduction in rank and if the person has been reverted to his substantive post, he is not entitled to complain that he has been illegally reverted. The question, however, is not one of reduction in rank nor one of reversion. The question is whether in a selection duly made by the Selection Board, the successful candidates as a whole could be placed in the panel merely on provisional basis, or, necessarily, in the absence of any special reason, the candidates had to be placed in the panel with a view to appointment to the higher posts as and when vacancies occurred in an officiating capacity or permanent capacity, as the case may be. The second question as already indicated above is whether the successful candidates whose names found place in the panel have any right under para. 217 of the Manual and whether by the impugned notification such rights have been infringed. In this view of the matter, we do not consider it necessary to discuss the ruling '*R S Sial v. State of U. P.* (1) on which reliance was placed by the learned counsel for the respondents.

For the reasons stated above, we allow the special appeal and set aside the judgment and order of the learned single Judge. The impugned notification, dated March 23, 1971 is quashed. The appellants will be entitled to their costs of this appeal.

Special appeal allowed.

(1) A-I R 1971 All. 375 (F B.)

APPELLATE CIVIL (F. B.)

Before Mr. Justice S. Chandra, Mr. Justice J. S.
Trivedi and Mr. Justice N. D. Ojha

RAMESH CHAND AND OTHERS . . APPELLANTS,

v.

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U. P. Tenancy (Amendment) Act, 1947, s. 27—*Proceeding of reinstatement under s 27 can continue even after enforcement of U P. Z A and L R Act.*

Proceedings under s 27 of the Amendment Act are proceedings under the U. P. Tenancy Act, 1939. They are proceedings in respect of a right or obligation or liability acquired or incurred under the Tenancy Act, because these proceedings have the effect of nullifying the previous operations of decrees for ejectment passed under ss 165, 171 and 180 of the principal Act. The proceedings under s. 27 were within the purview of the U. P. Land Tenures (Legal Proceedings) Removal of Difficulties Order, 1952, and hence could validly continue and be decided in accordance with the provisions of the Tenancy Act read with the Amending Act, 1947, notwithstanding their repeal.

—, s 27(3) and (5) and U P Z A. and L. R. Act, 1950, ss. 21 and 201—*Ejectment of hereditary tenant—Another person inducted on reinstatement becomes a hereditary tenant.*

The effect of reinstatement of the applicant is nullification of the operation of the decree for ejectment. His rights and liabilities existing on the date of ejectment revive. They are not conferred afresh. On reinstatement the original hereditary tenant becomes the hereditary tenant of the holding with the same rights and liabilities. A subsequently inducted tenant does not become a Sirdar under s 19 of the Z. A. Act on the footing that he was a hereditary tenant of the holding on June 30, 1952. He becomes an Asami under s. 21 of the Act liable to ejectment under s. 202 of the U. P. Z. A. and L. R. Act.

U. P. Z. A. and L. R. Act, 1950, ss. 19, 20(a)(ii) and 342—*Whether sub-tenant under s. 27(3) of Amending Act, 1947, becomes a Sirdar under U. P. Z A and L. R Act or an Asami under s. 21 liable to ejectment.*

Under s. 20(a)(ii) a sub-tenant becomes an Adhivasi, but there is an express exclusion of a sub-tenant referred to in the proviso to s. 27(3) of the Amending Act of 1947. A person

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declared to be sub-tenant under the proviso does not acquire Adhivasi rights. The subsequently inducted person becomes an Asami under s. 21 and hence under liability to ejectment under s. 202 of Z. A. and L. R. Act.

The declaration of rights having retrospective effect the person so declared to be entitled to reinstatement as a hereditary tenant will be deemed to be the hereditary tenant on the date preceding the date of vesting, the subsequently inducted tenant being deemed only a sub-tenant, s. 342 acts as a proviso or an exception to s. 190.

Special Appeal No. 373 of 1965 against the judgment and order of R. S. PATHAK, J. in Civil Miscellaneous Writ No. 1471 of 1961 decided on 29th July, 1965.

K. C. Saxena and B. D. Tripathi, for the Appellants.

B. D. Madhyan, J. S. Gupta and V. K. S. Chaudhary, for the Respondents

S. CHANDRA, J.:—A Bench has referred these two connected special appeals to a full Bench because it felt that the decision of another Division Bench in *Gopal Narain v. Kanchan Lal* (1) required reconsideration.

Bhagmal, the respondent, was the original hereditary tenant of the holding in suit. The Zamindars obtained a decree for the ejectment of Bhagmal under s. 171, U. P. Tenancy Act, 1939, on February 7, 1942. In execution, possession was delivered to the Zamindars on May 29, 1942. A couple of months later, in July, 1942, the Zamindars inducted the appellants, Soran Singh and others as hereditary tenants over the holding indispute. Some disputes having arisen between Bhagmal and the appellants, the appellants in 1946 filed a suit under s. 59, U. P. Tenancy Act, for a declaration that they were the hereditary tenants of the holding. The trial court dismissed the suit, but on appeal it was decreed, and it was declared that the appellants were the hereditary tenants. The Board of Revenue upheld the appellate decree on December 24, 1951.

(1) A I.R. 1971 All. 556.

During the pendency of the appeal, U. P. Tenancy (Amendment) Act 10 of 1947 came into force. On August 13, 1947, Bhagmal applied for reinstatement to the holding under s. 27 of the Amending Act of 1947. The hearing of this application appears to have been stayed because of the pendency of the declaratory suit. The application was ultimately allowed by the trial court on July 13, 1953. Bhagmal was reinstated to the holding; the appellants were declared its sub-tenants entitled to remain in possession for three years, under the proviso to s. 27 (3) of the Amending Act. The appellants went up in appeal but failed. They filed a second appeal which was also dismissed by the Board of Revenue. The appellants then carried the dispute to this Court under Writ Petition no. 1471 of 1961. The writ petition, was, however, dismissed on July 29, 1965 leading to Special Appeal no. 373 of 1965.

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After the expiry of the three years period for which the appellants were entitled to remain in possession as sub-tenants, Bhagmal on September 20, 1956, filed a suit for ejectment of the appellants under s. 202 of the Zamindari Abolition Act. The suit was decreed on November 13, 1961. The appellants' appeal as well as their second appeal were also dismissed. The appellants then filed a writ petition in this Court which was dismissed by a learned single Judge on March 2, 1971. Against this judgment the appellants filed Special Appeal no. 311 of 1971.

The submissions of the learned counsel for the parties raise the following points:

(1) Whether the declaratory decree under s. 59, U. P. Tenancy Act, operated as *res judicata*;

(2) Whether the application for reinstatement under s. 27 of the Amending Act of 1947 could be decided on the merits after June 30, 1952, the date

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preceding the date of vesting under the Zamindari Abolition Act ;

(3) Whether Bhagmal acquired the status of a *sirdar* under the Zamindari Abolition Act ; and

(4) Whether the appellants became *asamis* or *sirdars* under the Zamindari Abolition Act.

Before the plea of *res judicata* can be considered, it must be pleaded at the proper stage. In order to establish such a plea, the copy of the judgment and the decree ought to be filed. We find that this plea was not taken in the proceedings. The appellants who rely upon this plea have not filed copy of the judgments rendered in the declaratory suit under s 59, U. P. Tenancy Act. It is hence not feasible to entertain such a plea.

The declaratory suit was filed in 1946. The Courts granted a declaration that the appellants were the hereditary as against Bhagmal. Normally, such a declaration would relate to the rights as they were on the date of the institution of the suit in 1946. It would not affect the change in the rights of the parties, if any, brought about by the Amending Act, 1947.

For the appellants reliance was placed upon the might and ought rule of the doctrine of *res judicata* and it was urged that Bhagmal could have and ought to have, realised appropriate plea arising out of the Amending Act of 1947 when the declaratory suit was still pending in appeal, when the Amending Act of 1947 came in force. In our opinion, there is no substance in this submission.

S. 27 of the Amending Act of 1947 entitled a person ejected, *inter alia*, under s. 171, U. P. Tenancy Act, to file an application for reinstatement to the holding, within six months of the commencement of the Act. The Court after hearing the parties, could make an order for reinstatement. Under sub-s (5) of s. 27 of the aforesaid Act, the rights and liabilities of the plain-

tiff revived on the making of an order for reinstatement to the holding. Bhagmal could possibly have raised a plea that he was the reinstated hereditary tenant, only after an order of reinstatement had been passed in his favour in proceedings under s. 27 of the Amending Act. Till an order of reinstatement was passed, his rights as the original hereditary tenant did not revive. He could not take any plea in the declaratory suit under s. 59 that his rights as hereditary tenant had revived till an order of reinstatement to the holding had been passed in his favour. Such an order was passed for the first time on July 13, 1953 long after the dismissal of the second appeal by the Board of Revenue on December 24, 1951. So till the date the declaratory suit was pending in second appeal, Bhagmal could not in law raise any useful plea in that suit, on the basis of the Amending Act of 1947. The doctrine of *res judicata* would not bar the application for reinstatement or the subsequent suit for the ejectment under s. 202 of the Zamindari Abolition Act under the might and ought rule.

The principal question is whether the proceedings for reinstatement could continue after the coming into force of the Zamindari Abolition Act.

S. 339 of the Zamindari Abolition Act, *inter alia*, repealed the U. P. Tenancy Act, 1939, with effect from July 1, 1952. In exercise of the powers conferred by s. 342 of Zamindari Abolition Act, the State Government issued the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952. This order, *inter alia*, provided that any legal proceeding in respect of any right, privilege, obligation or liability acquired, accrued or incurred under or in pursuance of the U. P. Tenancy Act, 1939, if pending on June 30, 1952, shall be decided in accordance with the provisions of that Act.

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The question upon which the parties are in controversy is whether proceedings for reinstatement under s. 27 of the Amending Act of 1947 are legal proceedings in respect of any right, privilege, obligation or liability acquired, accrued or incurred under the U P. Tenancy Act, 1939.

For the appellants it was urged that s. 27 was not bodily incorporated in any section or otherwise in the body of the U P. Tenancy Act, 1939. It was an independent provision which retained its efficacy and operation because of the continuance in force of the Amending Act of 1947. A proceeding commenced under s. 27 could not hence be a proceeding under the U. P. Tenancy Act or in respect of any right, etc. acquired under that Act.

The Amending Act of 1947 was entitled as the United Provinces Tenancy (Amendment) Act, 1947. Its preamble stated that it was an Act further to amend the United Provinces Tenancy Act 17 of 1939. This would show that the legislative intent was to amend the Tenancy Act. Ss. 2 to 26 and 32 and 33 of the Amending Act made amendments in various sections of the principal Act namely the Tenancy Act of 1939. S. 27 provides for reinstatement of tenants who had been ejected under ss. 165, 171 and 180 of the principal Act and for the revival of their rights and liabilities as they existed on the date of their ejectment. A Division Bench of this Court in *Daryao Singh v. Board of Revenue* (1) had occasion to consider the effect of the Amending Act of 1947 upon the principal Act of 1939. It was observed that s. 27 deals with the ejectments effected prior to the Amendment under ss. 165, 171 and 180 of the principal Act. In a way s. 27 is intended to amend the effect of ss. 165, 171 and 180. S. 27 is in substance a proviso to each of these three sections.

S. 27 of the Amending Act was not given a permanent place in the parent Act because s. 27 as its terms

(1) 1952 A.L.J. 196.

would show, was temporary in operation. An application under it could be made within six months from the date of commencement of the Act. The Bench observed that to find out whether or not a certain law amends an existing law, one has to see its pith and substance and not its form. There is no room for any doubt that the scope of s. 27 is the same as that of ss. 165, 171 and 180 of the parent Act. It amends the previous operation of those three sections to a certain extent by nullifying the decree which had been passed under them. The very name "Amending Act" shows that it is an Act intended to amend the U. P. Tenancy Act. In view of the wide language of s. 242 of the U. P. Tenancy Act, 1939, which provides that suits and applications of the nature specified in the Fourth Schedule shall be heard and determined by the revenue court, the clear effect was to insert an application under s. 27 of the Amending Act also in the Fourth Schedule. S. 27 was a part and parcel of the U. P. Tenancy Act, 1939. The Bench held that a revision was maintainable under s. 275 of the U. P. Tenancy Act against decisions made in an application for reinstatement under s. 27 of the Amending Act. With respect in our opinion, this decision lays down correct law. Proceedings under s. 27 of the Amending Act are proceedings under the U. P. Tenancy Act, 1939. They are proceedings in respect of a right or obligation or liability acquired or incurred under the Tenancy Act, because these proceedings have the effect of nullifying the previous operation of decrees for ejectment passed under ss. 165, 171 and 180 of the principal Act. The proceedings under s. 27 were within the purview of the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, and hence could validly continue and be decided in accordance with the provisions of the Tenancy Act read with the Amending Act of 1947, notwithstanding their repeal.

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Learned counsel for the appellants urged that the fact that the Zamindari Abolition Act specifically refers to the Amending Act of 1947 as such, shows that the legislative intent was to treat it as an independent Act and not as a provision amending the Tenancy Act or as introducing any provision therein. Relying on the decision of the Supreme Court in *Shamrao v. District Magistrate Thana* (1) it was urged that an Act after its amendment remains and is identified as the principal Act. The Amending Act is not referred to independently. In para 7 the Supreme Court held that according to the prevailing canons of construction, the rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the Amending Act at all. A perusal of para 7 of the Supreme Court decision shows that this rule applies except where that would lead to a repugnancy, inconsistency or absurdity.

In our opinion, the exception applies to the present case. It has been seen that s. 27 of the Amending Act of 1947 operated as a proviso to several sections of the principal Act. Instead of making the same detailed provision in ss. 165, 171 and 180 of the Tenancy Act separately, the Legislature thought it better to make a single separate provision to cover all those sections. Since the provisions of s. 27 were not bodily incorporated in some existing provisions of the principal Act but they were to act only as a proviso thereto, the Zamindari Abolition Act had to refer to the Amending Act specially when it conferred rights on persons reinstated under cl. (c), s. 27(1) alone. This was necessary in

(1) A.I.R. 1952 S.C. 824.

order to identify the persons upon whom rights were to be conferred. It was a matter of form. It did not affect the pith and substance of the Amending Act of 1947.

The next question for consideration relates to the rights acquired by the parties under the Zamindari Abolition Act. The acquisition of rights under the Zamindari Abolition Act would depend upon the effect of the reinstatement ordered under s. 27 of the Amending Act of 1947. Under sub-s. (3) of s. 27 the Court is to order that the applicant be reinstated in such holding and that any other person in possession of it be ejected therefrom. Its proviso states that if such holding be in the possession of any person to whom the landholder had let it out before the 1st day of September, 1946, the Court, instead of ordering the ejectment of such person, shall, notwithstanding the provisions of any law for the time being in force, declare him to be the sub-tenant of the applicant. The person so declared as sub-tenant shall not be liable to ejectment until after the expiry of three years from the date of the declaration. Sub-s. (5) of s. 27 provides—

“On reinstatement, their rights and liabilities of the applicant existing on the date of his ejectment or dispossession in respect of the holding or any part thereof from which he was ejected or dispossessed, shall revive subject to the proviso to sub-s. (3).”

The effect of reinstatement is nullification of the operation of the decree for ejectment of the applicant. The rights and liabilities of the applicant existing on the date of his ejectment revive. They are not conferred afresh. On reinstatement the original hereditary tenant becomes the hereditary tenant of the holding, with the same rights and liabilities.

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Corpus Juris Secundum, Vol. 77, p. 362, defines "revive" to mean—

"to bring again to life, to reanimate, to renew, to bring into action after a suspension; to restore or bring again to life; to bring back to life an object which has become moribund. . . ."

This suggests that a revived right or obligation had till then remained in a state of suspension and became active or reanimated on revival. The original rights and liabilities of the applicant continued to remain in existence, though in a state of suspension. This coupled with the fact that the effect of the decree for ejectment was nullified, suggests that in the eye of law the applicant remained a tenant during the period between his ejectment and reinstatement, but since he was out of possession he could not actively exercise his rights or be subject to his liabilities.

It is settled that a Zamindar cannot lawfully superimpose a person as a tenant on the holding of an existing tenant. With the revival of the tenancy rights of the applicant, the position in law would be that the person who was inducted on the holding by the Zamindar after the ejectment of the original tenant, would no longer be entitled to the rights of status of a hereditary tenant. Even if initially rights as hereditary tenant accrued in favour of such inducted person, they will stand nullified by the order of reinstatement. Two persons cannot at the same time be validly hereditary tenants of a holding. When sub-s. (5) of s. 27 provides for the revival of the rights of the original tenant, its necessary consequence and effect is the nullification of whatever rights may have initially accrued to the subsequently inducted person. The nullification is co-extensive with the revival. Since the pre-existing rights and liabilities of the original tenant revive, their revival

can be effective only if the nullification of the rights and obligations of the subsequently inducted tenant is co-extensive in duration. The subsequently inducted tenant could not hence validly say that he was ever the hereditary tenant of the holding.

So, even if the subsequently inducted person may have been a hereditary tenant on the date preceding the date of vesting, namely June 30, 1952, yet the effect of the order of reinstatement passed subsequent to that date is retrospective nullification of those rights; with the result that such a person cannot be deemed to be hereditary tenant on June 30, 1952. In this view, such a person cannot claim to have become a *sirdar* under s. 19 of the Zamindari Abolition Act on the footing that he was a hereditary tenant of the holding on June 30, 1952.

S. 19 of the Zamindari Abolition Act confers *sirdari* rights, on *inter alia*, hereditary tenants who held the holding or were deemed to hold it as such on June 30, 1952. The effect of the order of reinstatement is that the reinstated tenant will be deemed to have held the holding as a hereditary tenant on June 30, 1952. The reinstated tenant becomes a *sirdar* under s. 19 of the Zamindari Abolition Act.

The question then arises as to the status of the subsequently inducted person. It has been seen that his status as a hereditary tenant is nullified by the order of reinstatement. Under the proviso to s. 27(3) the Court is to declare such person as the sub-tenant of the applicant, entitled to remain in possession for a fixed period of three years from the date of the declaration. The proviso does not expressly say that the declaration as a sub-tenant is to be prospective. The only prospective provision is about exemption from liability to ejectment for three years from the date of the declaration.

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In our opinion, the proviso ought to be read as having the effect of a retrospective declaration as a sub-tenant with a prospective immunity from ejectment for three years. Read this way, the proviso has the merit of not leaving a vacuum in regard to the rights of the inducted person, for the period between his induction and the date of the declaration as sub-tenant. The declaration as sub-tenant is effective for this prior period as well, with the result that for this intervening period the applicant remains the hereditary tenant, the subsequently inducted person being his sub-tenant.

This construction is corroborated by s 20 of the Zamindari Abolition Act. Under s. 20(a)(ii) a sub-tenant becomes an Adhivasi; but there is an express exclusion of a sub-tenant referred to in the proviso to s. 27(3) of the Amending Act of 1947. A person declared to be a sub-tenant under the proviso does not acquire Adhivasi rights. Similarly, such a sub-tenant does not acquire Adhivasi rights under cl. (b)(i) of s 20, by virtue of the express exclusion of such person by sub-s. (2) of s. 20. This would show that though such a person was recognised to be a sub-tenant for a period prior to the order of reinstatement and declaration as a sub-tenant, including the date preceding the date of vesting, yet he was not given Adhivasi rights. The reason is that such a person was conferred Asami rights under cl. (c) of s. 21 of the Zamindari Abolition Act. The subsequently inducted person becomes an Asami under s. 21 and hence is under a liability to ejectment under s. 202 of the Zamindari Abolition Act.

The view that on reinstatement pre-existing rights revive retrospectively is supported by a decision of a Bench in *Sri Ram Pathak v Board of Revenue* (1). In that case a trespasser mentioned in cl. (c) of s. 27(1)

(1) 1966 A.L.J. 343.

was reinstated. After reinstatement a suit for his ejectment was again filed. Previously the period of limitation for a suit under s. 180 of the Tenancy Act for ejectment of a trespasser was three years. By s. 32 of Act 10 of 1947 the period was reduced to two years. The Bench held that for the second suit for ejectment (filed after the commencement of Act 10 of 1947) the applicable period of limitation will be two years. It was also held that if the reinstated trespasser had completed two years of possession prior to his original ejectment, he would be entitled to retain possession after reinstatement and will not be liable to ejectment again. But if he had not completed two years at that time, the second suit for ejectment will succeed. This shows that the period of possession prior to the original ejectment was liable to be recognised and was a material circumstance for deciding the rights in the second suit for ejectment. After completion of two years, a trespasser became a hereditary tenant under s. 180(2), U P Tenancy Act. The effect of the reduction in the period of limitation was retrospectively made applicable to the possession of the trespasser prior to the commencement of Act 10 of 1947, as a result of the retrospective operation of the order of reinstatement. The decision in *Sri Ram Pathak's* case (1) was upheld by a Full Bench in *Kedar Nath v. Jamuna* (2).

Assuming, however, that the correct legal position is that the person declared to be a sub-tenant under the proviso aforesaid becomes a sub-tenant only from the date of the declaration, the result will be that such a person will not acquire Asami rights in cases where the declaration is made after the date of vesting; because ... confers Asami rights on persons who were sub-tenants on the date preceding the date of vesting,

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(1) 1956 A.L.J. 848

(2) 1964 A.L.J. 442 (F.B.).

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namely on June 30, 1952. In that event the appellants did not become Asamis. They did not acquire any other status under the Zamindari Abolition Act; their only right was to remain in possession for three years under the proviso to s 27(3) of the Amending Act of 1947. Thereafter they had no immunity from ejectment. Their right to remain in possession as sub-tenants having extinguished on the expiry of three years, their possession thereafter would be as trespassers. A trespasser is liable to be ejected under s. 209 of the Zamindari Abolition Act

A suit under s. 209 lies in the same Court as a suit under s. 202. It is true that the present proceedings arise out of the suit for ejectment under s. 202. But the jurisdiction of the Court does not depend upon the label given to a suit for ejectment. If in its pith and substance the suit is within the competence of a Court, the Court can entertain and decide it. It is thus clear that even on this line of reasoning the appellants cannot gain immunity from ejectment.

It was urged that the subsequently inducted tenant being a hereditary tenant till the passing of the order of reinstatement, he in fact as well as in the eye of law, was a hereditary tenant on the date preceding the date of vesting mentioned in s. 19 of the Zamindari Abolition Act, in those cases where the order of reinstatement is passed after the date. Under s. 19 he acquired Sirdari rights. Having acquired rights of Sirdar he can lose them only in the contingencies mentioned in s. 190 of the Zamindari Abolition Act, which provides for the extinguishment of Sirdari rights. The effect of the reinstatement order is not mentioned in s. 190 as operating to extinguish Sirdari rights. The submission is plausible in so far as it goes.

S. 342 of the Zamindari Abolition Act confers upon the State Government power to issue orders to remove difficulties. Under cl. (a) thereof the State Government can by order direct that this Act shall have effect subject to such adaptations and modifications as may be mentioned in it. The Removal of Difficulties Order, 1952, provided that pending proceedings shall continue to be decided in terms of the repealed U. P. Tenancy Act or the Land Revenue Act as the case may be. The result was that those proceedings were liable to be decided unaffected by the provisions of the Zamindari Abolition Act. If in a pending proceeding there is a dispute as to who was the hereditary tenant, the effect of such proceeding continuing and being decided unaffected by the Zamindari Abolition Act necessarily is that the decision reached in that proceeding will prevail and the rights under the Zamindari Abolition Act will accrue on the basis of and in accordance with such decision. The effect of s 342, Zamindari Abolition Act read with the Removal of Difficulties Order and the order of reinstatement, would be the retrospective creation or nullification of the rights of the parties on the date preceding the date of vesting. Sirdari rights under s. 19 of the Zamindari Abolition Act would accrue in favour of the person who is held to be the hereditary tenant in such proceedings. The declaration of rights having retrospective effect, the person declared to be entitled to reinstatement as a hereditary tenant will be deemed to be the hereditary tenant on the date preceding the date of vesting, the subsequently inducted tenant being deemed only a sub-tenant. S. 342 acts as a proviso or an exception to s. 190.

It was also submitted that if the Zamindari Abolition Act intended to confer rights on reinstated tenants mentioned in cls. (a) and (b) of s. 27(1) of the Amending Act of 1947, then there would have been as clear

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and specific a provision in regard to them, as the Legislature made for ejected persons for whom reinstatement was provided by cl. (c) of s. 27(1) aforesaid. There is an underlying fallacy in this submission. Cls. (a) and (b) of s. 27(1) deal with tenants ejected under ss. 165 and 171 of the U. P. Tenancy Act. They apply, *inter alia*, to hereditary tenants. But cl. (c) refers to a particular class of trespassers, namely those who were recorded as occupants on January 1, 1938, in a revised or corrected record. Such persons were not recognised by the Tenancy Act as having any rights as a tenure-holder. Sub-s. (5) of s. 27 provided for revival of the rights and liabilities. On reinstatement the applicant gets the same rights and liabilities which he had on the date of ejectment. A trespasser had no rights. He was liable to ejectment under s. 180 as a trespasser. Since such a person did not get any right to the holding in spite of reinstatement, it was necessary to confer rights on him. That is why he has been specifically mentioned in cl. (1) of s. 16 of the Zamindari Abolition Act. Under it he becomes Sirdar if he was reinstated to land to which s. 16 applies and was in possession. He gets Adhivasi rights under s. 20(b)(i) if he was recorded as an occupant in 1356 Fasli. Since persons mentioned in cls (a) and (b) of s. 27(1) of the Amending Act acquired tenancy rights on reinstatement, it was not necessary to provide for them separately under the Zamindari Abolition Act. As recognised tenants, they acquired rights under ss. 18 and 19. The Legislature while enacting the Zamindari Abolition Act made it clear that a trespasser who was recorded as an occupant on January 1, 1938 would not get any rights under the Zamindari Abolition Act even if he is reinstated, in those cases where he is reinstated to land which constituted a part of the holding of a tenure-holder mentioned in the explanation to s. 16. This exception, however, does not apply to subsequently inducted tenant, because on rein-

statement of a trespasser mentioned in cl (c) the subsequently inducted tenant, if any, becomes a sub-tenant; and the explanation to s. 16 does not refer to land included in the holding of a sub-tenant. Since on the reinstatement of such a trespasser the subsequently inducted tenant became a sub-tenant, it was all the more necessary to expressly confer rights on such reinstated trespasser, because otherwise the rights of the sub-tenant would have prevailed over a trespasser. This situation could not arise between a reinstated tenant and a person declared to be a sub-tenant

On these considerations, the decision in *Gopal Narain v Kanchan Lal* (1) appears to us to lay down the law correctly. In our opinion, Bhagmal became a Sirdar. The appellants acquired the status of sub-tenants. They were liable to ejectment on the expiry of three years from the date of the order of reinstatement. The application for reinstatement was rightly allowed. The suit for ejectment under s. 202, Zamindari Abolition Act, was validly decreed.

In the result, both the appeals fail and are accordingly dismissed with costs.

Appeal dismissed.

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Before Mr Justice H. Swarup and Mr Justice K. N. Singh

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U. P. Municipalities Act, 1916, s. 39—Genuineness of the resignation—State Government to hold enquiry and satisfy itself about it

(1) A.I.R. 1971 All. 556

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S. 39 of the U P. Municipalities Act does not provide for holding any enquiry or for passing any order of acceptance but the State Government is under a duty to satisfy itself about the genuineness of the resignation letters and for that purpose it may hold enquiry for its own satisfaction

Thankamma v Hon'ble Speaker, Legislative Assembly (1) relied on

Surat Singh Yadav v. Sudama Pd Goswami (2) referred and followed.

Civil Miscellaneous Writ no 5736 of 1972.

A. Kumar, for the petitioner.

Standing Counsel, for the Opposite-parties

K. N. SINGH, J.:—Municipal Board, Hapur, in district Meerut, is constituted of twenty-one members including the President Rameshwar Das Mittal, the petitioner, was elected President of the Municipal Board, Hapur (hereinafter referred to as the Board) in May 1971. On August 9, 1972, a written notice of motion of non-confidence against the petitioner signed by fifteen members of the Board together with a copy of the motion was delivered in person to the District Magistrate by two members of the Board, namely, Ved Prakash and Brij Mohan. In exercise of his powers under s. 87-A(3) of the U P Municipalities Act, the District Magistrate convened a meeting of the Board for consideration of the motion to be held at the office of the Board on September 11, 1972.

On August 22, 1972, six registered envelopes were received in the office of the District Magistrate, Meerut, containing six typed resignation letters from the membership of the Board purporting to have been signed by Khem Chand, Chhida Singh, Shahid Beg, Brij Mohan, Vijendra Kumar and Khushwaqt Rai, respondents nos. 4, 5, 6, 7, 8 and 9, respectively, to the petition. On the following day, namely, August 23, 1972, another three registered envelopes were received in the

(1) A.I.R. 1952 Trav. Cochin 166. (2) A.I.R. 1956 All 156.

office of the District Magistrate containing three typed resignation letters from the membership of the Board purporting to have been signed by Rajendra Prasad, Magan Lal and Chokhey Lal, respondents nos. 10 to 12 to the writ petition. The District Magistrate forwarded the aforesaid nine resignation letters to the State Government for necessary action. Meanwhile notices were issued by the District Magistrate to the members of the Board giving information about the time, date and place of the meeting convened for the purpose of consideration of the motion of non-confidence against the petitioner but no such notices were issued to respondents nos. 4 to 12 in view of their resignations from the membership of the Board. It appears that respondents nos. 4 to 12 came to know of the resignation letters and the action taken by the District Magistrate. On September 2, 1972, five members of the Board, namely, Vijendra Kumar, Khushwaqt Rai, Chokhey Lal, Brij Mohan and Magan Lal made an application before the District Magistrate denying their resignation letters. They asserted that they had never sent any resignation letter to the District Magistrate and that somebody interested in defeating the motion of non-confidence had committed forgery. They made a prayer for being allowed to take part in the meeting convened for considering the motion of non-confidence on September 11, 1972. Each of the five persons namely Vijendra Kumar, Khushwaqt Rai, Chokhey Lal, Brij Mohan and Magan Lal filed affidavits before the District Magistrate affirming that they had not sent any resignation to the District Magistrate from the membership of the Board and that they desired to continue as members of the Board. Similar application and affidavits were filed by the four other affected members of the Board, namely, Rajendra Prasad, Khem Chand, Shahid Beg and Chhida Singh on September 3, 1972. The District Magistrate forwarded the affidavits of the

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aforesaid nine members to the State Government. By a letter dated, September 5, 1972, the State Government informed the District Magistrate that respondents nos. 4 to 12 who had denied to have sent the resignation letters, were entitled to continue as members and the affidavits filed by them *prima facie* indicated that their contention was correct. The State Government, therefore, directed that there was no vacancy in the membership on account of the said resignation letters. In pursuance of the letter of the State Government the District Magistrate treated respondents nos. 4 to 12 as members of the Board and issued notices requesting them to attend the meeting of September 11, 1972. Intimation to that effect was given to the petitioner also who was the President of the Board.

On September 11, 1972, a meeting of the Board was held which was presided over by Sri R. S. Tripathi, Munsif, Haval, Meerut, a Civil Judicial Officer. The meeting was attended by fourteen members of the Board including respondents nos. 4 to 12. All the fourteen members present at the meeting supported the motion of non-confidence and voted in its favour. The Civil Judicial Officer, namely Sri R. S. Tripathi, declared the motion of non-confidence to have been carried. The minutes of the meeting together with a copy of the motion and the result of the voting thereon were sent to the District Magistrate and the petitioner also as required by s. 87-A(11) of the Act. The petitioner could not be served personally. Hence copies of the minutes of the meeting and the motion of non-confidence were affixed at his door. The petitioner thereupon filed this petition before this Court under Art. 226 of the Constitution challenging the validity of the motion of non-confidence, amongst other things. The petitioner claimed a relief for the issue of a writ of *quo warranto* calling upon the respondents 4 to 12 to show under

what authority they were holding the office of membership of the Board. A writ of *mandamus* was also claimed by the petitioner directing respondents nos. 1 and 2, namely the State Government and the District Magistrate, not to treat respondents nos. 4 to 12 as members of the Board and further not to give effect to the motion of non-confidence alleged to have been passed against the petitioner. A writ of *certiorari* was also claimed by the petitioner quashing the resolution of non-confidence passed at the meeting of the Board dated September 11, 1972. A writ of *mandamus* was further claimed directing the State Government and the District Magistrate not to interfere with the petitioner's functioning as President of the Municipal Board, Hapur.

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Learned counsel for the petitioner requested us to send for the original resignation letters as the same would show that the respondents nos. 4 to 12 had signed the same. We accordingly directed the Standing Counsel to produce the original letters and also other documents, e.g. the motion of non-confidence, the notice of motion of non-confidence and the affidavit in original filed by respondents nos. 4 to 12 before the District Magistrate.

At the time of the hearing of the writ petition for admission the respondents nos. 4 to 12 filed affidavits before this Court asserting therein that they had never signed any letter of resignation nor they had sent any such resignation letter to the District Magistrate and that on coming to know that some resignation letters had been sent to the District Magistrate purporting to be on their behalf they refuted the same filing affidavit before the District Magistrate. On behalf of the District Magistrate also an affidavit was filed before us giving details of the circumstances in which the resignation letters and affidavits of respondents 4 to 12 were

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received by him annexing thereto a copy of the letter of the State Government addressed to the District Magistrate directing him to treat respondents nos 4 to 12 as members of the Board. The petitioner also filed a supplementary affidavit annexing thereto an affidavit of Ghanshyam Singh Tyagi, Vice-President of the Municipal Board, Hapur, wherein he stated that the resignation letters of respondents nos. 4 to 12 were actually written and signed by them at his residence in his presence. The originals of the affidavits filed before the District Magistrate by respondents nos. 4 to 12 and the original notice of motion of non-confidence signed by fifteen members including respondents nos. 4 to 12 and the motion of non-confidence signed by them presented to the District Magistrate on August 9, 1972, were also produced before us by the learned Standing Counsel. In addition to these, the original letters of resignation which were received by the District Magistrate purporting to have been signed by respondents nos 4 to 12 were also produced before us. The learned counsel for the petitioner was allowed to inspect the said documents. During the course of argument the learned counsel for the petitioner produced a register of the Municipal Board purporting to be the register of attendance of the members which contained signatures of the members of the Board including those of respondents nos. 4 to 12. This register was, however, taken back by the petitioner after we compared the relevant signatures.

Sri Shanti Bhushan, learned counsel for the petitioner urged that once the letters of resignation signed by respondents nos 4 to 12 addressed to the State Government were received at the office of the District Magistrate, the seats of the said members became vacant by operation of law. Hence the action of the State Government and the District Magistrate in treating res-

what authority they were holding the office of membership of the Board. A writ of *mandamus* was also claimed by the petitioner directing respondents nos. 1 and 2, namely the State Government and the District Magistrate, not to treat respondents nos. 4 to 12 as members of the Board and further not to give effect to the motion of non-confidence alleged to have been passed against the petitioner. A writ of *certiorari* was also claimed by the petitioner quashing the resolution of non-confidence passed at the meeting of the Board dated September 11, 1972. A writ of *mandamus* was further claimed directing the State Government and the District Magistrate not to interfere with the petitioner's functioning as President of the Municipal Board, Hapur.

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Learned counsel for the petitioner requested us to send for the original resignation letters as the same would show that the respondents nos. 4 to 12 had signed the same. We accordingly directed the Standing Counsel to produce the original letters and also other documents, e.g. the motion of non-confidence, the notice of motion of non-confidence and the affidavit in original filed by respondents nos. 4 to 12 before the District Magistrate.

At the time of the hearing of the writ petition for admission the respondents nos. 4 to 12 filed affidavits before this Court asserting therein that they had never signed any letter of resignation nor they had sent any such resignation letter to the District Magistrate and that on coming to know that some resignation letters had been sent to the District Magistrate purporting to be on their behalf they refuted the same filing affidavit before the District Magistrate. On behalf of the District Magistrate also an affidavit was filed before us giving details of the circumstances in which the resignation letters and affidavits of respondents 4 to 12 were